Supreme Court, U.S.
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No. 06-378

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether facts that increase a defendant's sentence must be proved beyond a reasonable doubt.

2. Whether it is permissible under the Sixth Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range.

3. Whether a district court has discretion under 18 U.S.C. § 3553(a) to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar.

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PETITION FOR WRIT OF CERTIORARI

William Thurston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion, dated July 26, 2006, (Appendix ("App.") 1a–19a) is reported at 456 F.3d 211 (1st Cir. 2006). The court of appeals' stay order, dated August 15, 2006, (App. 20a) is unreported. The district court's oral statement of reasons for its imposition of the sentence on remand (App. 186a–226a), made at the sentencing hearing on June 16, 2005 (App. 46a–226a), is unreported. The district court's Memorandum of Sentencing Hearing and Report of Statement of Reasons, dated June 16, 2005, (App. 39a–45a) is unreported. The district court's amended judgment after resentencing on remand, dated June 17, 2005, (App. 30a–38a) is unreported. The district court's second amended judgment, correcting a clerical mistake, dated June 30, 2005, (App. 21a–29a) is unreported. The opinions issued before the resentencing, including this Court's opinion granting Thurston's petition for writ of certiorari, vacating judgment, and remanding for further consideration in light of *United States v. Booker* (App. 237a), are listed and included in the Appendix.

STATEMENT OF JURISDICTION

The court of appeals' judgment and opinion were entered on July 26, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *Id.* amend. VI.

The statute providing the factors to be considered in imposing a criminal sentence, 18 U.S.C. § 3553(a), is reprinted at App. 360a–62a.

STATEMENT OF THE CASE

Pre-Trial Proceedings in District Court

In a one-count indictment, Thurston and three other former executives of Damon Clinical Laboratories were charged with violating 18 U.S.C. § 371 by conspiring to defraud the United States.[1] The district court had jurisdiction under 18 U.S.C. § 3231.

Before Thurston went to trial, codefendant Isola, who had been Damon's President, pleaded *nolo contendere*. App. 348a–58a. As part of Isola's plea agreement, he signed a statement of facts in connection with a one-count information charging violation of § 371, and waived preparation of a presentence report. The prosecutors, aware that the district court intended to impose a probationary sentence, dismissed the indictment, filed the information, joined Isola's waiver of the presentence report, and agreed not to appeal. The prosecutors made no recommendation as to Isola's sentence under the federal sentencing guidelines ("the Guidelines"), and made no mention of "amount of loss"

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[1] The indictment alleged that Thurston, Joseph Isola, Beno Kon, and Gerald Cullen caused Damon's physician-clients to order "medically unnecessary" tests by adding a test for ferritin to a pre-existing panel of blood-chemistry tests, and by adding two tests for apolipoprotein to a coronary-disease profile. The indictment further alleged that Isola, Kon, and Cullen—but not Thurston—caused physicians at dialysis facilities to conduct medically unnecessary blood draws and evade Medicare rules by splitting one panel with one payment into two panels with two payments.

or any other Guidelines enhancement. The court sentenced Isola to three years' probation and imposed a $100 special assessment. Isola was not required to cooperate with the government as a condition of his plea agreement. Accordingly, the government did not request, nor did the court grant, a downward departure based on substantial assistance to authorities. App. 77a–78a, 161a–64a, 213a, 348a–58a.

The government offered Thurston a similar plea deal. App. 164a, 303a, 331a–32a. The district court explained that if Thurston declined this offer he might not receive a two-level reduction for acceptance of responsibility. But the court also stated it "would [n]ever increase a person's sentence because he exercised his right to go to trial." App. 358a–59a.

Trial and Initial, Pre-*Booker* Sentencing

Thurston exercised his right to trial. The court ordered an acquittal on the indictment's apolipoprotein allegations. The jury returned a general guilty verdict as to the ferritin allegations on December 17, 2001.

The prosecutors, in contrast to their conduct as to Isola, submitted an adversarial "summary of the facts," which was incorporated nearly verbatim into the presentence report. The government argued (1) there was an "intended loss" of $5,800,000, (2) there was more than minimal planning, (3) Thurston was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive, and (4) Thurston obstructed justice by committing perjury at trial. The prosecutors argued for a total offense level of 28 and a sentence of 78 to 97 months' imprisonment, capped by statute at 60 months, three years' supervised release, a $125,000 fine, and a $100 special assessment. App. 315a–16a.

Under the Guidelines, the base offense level was six. Based on facts found by the sentencing judge by a preponderance of the evidence, the Guidelines mandated that the

judge increase Thurston's sentence by 20 offense levels for the amount of intended loss (14 levels), the extent of planning (two levels), and his role in the offense (four levels).[2] App. 316a. These facts were neither found by the jury nor admitted by Thurston. With no criminal history, Thurston fell into Criminal History Category I. *Id.* If based solely on the jury's general verdict, the applicable Guidelines sentencing range would have been zero to six months' imprisonment. U.S.S.G., Sentencing Table. Applying the mandatory enhancements, Thurston's sentence increased to a range of 63 to 78 months' imprisonment, *id.*, capped by § 371 at 60 months, *id.* § 5G1.1(a); 18 U.S.C. § 371. Thurston challenged each of these factual findings and attendant offense-level enhancements in objections to the presentence report, briefing, and oral argument.

The district court departed downward from the Guidelines range to offense level 10, sentenced Thurston to three months' imprisonment and 24 months' supervised release (the first three months in home detention), and imposed a $100 special assessment. App. 345a–46a. The court rested its departure on two grounds. First, the court departed to effectuate the Guidelines' underlying principles of uniformity and proportionality in sentencing, mitigating the disparity between Thurston's sentence and that of his codefendant Isola, who the court found to be the conspiracy's "prime architect." App. 325a–26a. Notwithstanding Thurston's lesser culpability, consistent with the court's earlier admonition that Thurston would not be eligible for

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[2] *See* U.S. Sentencing Guidelines Manual (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (base offense level for fraud is six); *id.* § 2F1.1(b)(1) (14-level increase for loss greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (two-level increase if offense involved more than minimal planning); *id.* § 3B1.1(a) (four-level increase if defendant was organizer or leader of criminal activity involving five or more participants or was otherwise extensive). The November 1992 Guidelines were used to avoid retroactivity problems. The court did not explicitly rule on the obstruction of justice claim.

a two-level acceptance-of-responsibility reduction, the court punished him more severely than Isola, whose offense level was eight. App. 326a–28a.

Second, the court departed downward because "Thurston's record of charitable work and community service is unique, extensive and extraordinary." App. 325a. The court stated: "I think the record should reflect that in over 14 years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church." *Id.*

Government's First Appeal

On the government's appeal from the district court's sentence, the court of appeals retroactively applied the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003), which, *inter alia*, changed the appellate standard of review for downward departures from "due deference" to *de novo*, § 401(d)(2) (amending 18 U.S.C. § 3742(e)). App. 273a–89a. The First Circuit held that departing from the Guidelines sentencing range to mitigate the disparity between Isola's and Thurston's sentences was improper. App. 290a–92a. The court also decided *de novo* that Thurston's lifetime of charitable work and community service was not "exceptional enough" to justify a departure. App. 292a–98a. The appellate court vacated the sentence and remanded for imposition of the maximum five-year prison term under the conspiracy statute and a fine. App. 300a.

In response to this decision, the district judge issued a memorandum and order recusing himself, stating "[he was] disinclined to mechanically impose a sentence" mandated by the court of appeals "which is clearly contrary to the objective of the sentencing guidelines and which severely punishes a defendant for exercising a constitutional right. The government should be prohibited from inflicting a harsh and punitive penalty on any citizen for the exercise of a fundamental right." App. 305a.

This Court's Summary Disposition After *Booker*

Thurston filed a petition for writ of certiorari in June 2004. While his petition was pending, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). The Court granted Thurston's petition, vacated the First Circuit's judgment, and remanded for reconsideration in light of *Booker*. App. 237a.

Resentencing on Remand Under *Booker*

On remand to the First Circuit, the court of appeals held that Thurston demonstrated plain error by "show[ing] a reasonable probability that the sentencing judge would, on remand, likely give him a more lenient sentence," and remanded for resentencing before a different judge. App. 230a–33a. The appellate court directed the sentencing judge to consider the government's allegation that Thurston committed perjury at trial, which the government contended was the principal fact distinguishing Thurston from codefendant Isola and justifying a more severe sentence.

During a two-day sentencing hearing, the court considered voluminous briefing and record materials, heard extensive argument, and clearly articulated its reasons for the sentence imposed. App. 46a–226a. The district court rejected two of Thurston's arguments: that the standard of proof for sentence-enhancing facts should be beyond a reasonable doubt and that Thurston should receive a sentence based solely on facts found by the jury (namely, a general finding of conspiracy). App. 48a–49a, 58a–71a, 191a–92a. The court did not disturb the factual findings and resulting 20 levels of sentence enhancements applied at the initial sentencing in 2002. App. 191a–93a, 207a.

The court carefully examined the government's claim that Thurston committed perjury at trial, which was "of considerable importance to [the court's overall sentencing]

analysis," not just in calculating the Guidelines sentencing range but in deciding the effect of the factors to be considered under 18 U.S.C. § 3553(a). App. 191a; *accord* App. 197a. The court emphasized that "perjury goes to the heart of the integrity of the judicial process" and is "a serious offense [that] deserves to be seriously punished." App. 200a. The court "spent many hours studying the record with regard to each of [the government's] three claims," App. 201a, and heard extensive argument, App. 80a–154a. The government withdrew one of its perjury claims, App. 143a, 200a, and the court found that the other two had not been proved, therefore rejecting imposition of an obstruction-of-justice enhancement, App. 197a–207a.

Explaining that it was "called upon to decide what is the most reasonable and appropriate sentence, taking into account among the other [§] 3553(a) factors the Sentencing Guidelines," App. 190a, the court "considered what [the Guidelines] prescribe seriously in this case," App. 215a. "[T]he issue is whether the [§] 3553(a) factors justify and make most appropriate a non-Guideline sentence." App. 192a–93a.

After considering the statutory factors, the court concluded that a sentence of three months' imprisonment and two years' supervised release with the first three months in home confinement,[3] as well as a $25,000 fine within the Guidelines range, was, as mandated by § 3553(a), sufficient, but not greater than necessary, to serve the purposes of sentencing. App. 187a–88a. The court explained:

> [P]rior to the time that I became immersed in this, I frankly expected I would impose a significantly longer sentence. But I've spent many

[3] For the relevant Guidelines range, supervised release with a condition of home detention is a "substitute" for imprisonment. U.S.S.G. § 5C1.1(c)(2), (e)(3). Thus, the sentence is the equivalent of six months' imprisonment followed by an additional term of supervised release.

> hours reading the excellent briefs, examining the pertinent parts of the transcript, and particularly examining whether perjury or obstruction of justice had been proven, which it has not. . . . [¶] I considered giving Mr. Thurston more jail time. . . . But it just would not be fair in the circumstances to do that.

App. 188a; *see also* App. 186a–226a (stating reasons for sentence).

In addition to the Guidelines range, the court considered the need for a sentence to afford adequate specific and general deterrence, to protect the public, to reflect the seriousness of the offense, and to provide just punishment. *See, e.g.*, App. 187a–88a, 216a–18a, 221a. The court also observed Thurston in court, heard his allocution, and considered his personal history and circumstances. *See, e.g.*, App. 147a–49a, 155a–56a, 177a, 216a. The government agreed that the extensive evidence of "good works" could be considered under § 3553(a), and conceded that a variance from the Guidelines range was warranted on that basis. App. 72a–73a, 193a; U.S. Sentencing Mem. 14–17, May 31, 2005; U.S. Sentencing Reply Mem. 14–15, June 8, 2005.

The court also considered "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" under § 3553(a)(6). The court accepted the first sentencing judge's finding that Isola was the "prime architect" of the conspiracy and engaged in more extensive "real offense conduct" than Thurston. App. 193a, 195a, 213a. Further, in the court's judgment, Isola did not unequivocally accept responsibility; Thurston's allocution was essentially equivalent to Isola's *nolo contendere* plea. App. 197a, 213a–14a. Nor did Isola cooperate with the government, as the government confirmed.[4] App. 78a, 213a. Perjury would

[4] The First Circuit's earlier opinion in this case erroneously stated that Isola had cooperated. *See* App. 290a–91a.

have been "a material difference between Thurston and Isola," but the court found that Thurston did not commit perjury at trial. App. 191a, 197a–207a. The only material difference between the codefendants was that Isola pleaded *nolo contendere* and Thurston went to trial. App. 213a–15a. The court reasoned that some lower sentence for Isola might be justified because, theoretically, his plea could have conserved prosecutorial or judicial resources, though the court noted the government had made no such showing. App. 196a. The court concluded there was no legitimate justification for a sentence disparity of more than six months' confinement.

The court also considered "the need for the sentence imposed . . . to promote respect for the law" under 18 U.S.C. § 3553(a)(2)(A). The court found that the government had implicitly made two representations: (1) that a probationary sentence for Isola's "real offense conduct" (or "relevant conduct" under the Guidelines) was sufficient to promote § 3553(a)'s purposes, including the need to reflect the seriousness of the offense and to provide adequate deterrence, and (2) that a probationary sentence would not perpetuate unwarranted disparity. App. 51a–52a, 194a–96a, 209a–10a (discussing U.S.S.G. ch. 6, pt. B, introductory cmt.; *id.* § 6B1.2). The court concluded there was no principled distinction between Thurston and Isola, except that Isola was more culpable. App. 193a–95a. The sentencing scheme enacted by Congress was not, the court explained, intended to result in disparities in these circumstances. App. 177a, 211a–12a. It was the court's judgment that a sentence of six months' confinement and a $25,000 fine would promote respect for the law, and any greater sentence would promote disrespect for the law. App. 208a–18a.[5]

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[5] Thurston timely paid the fine, and had already completed his entire sentence as of November 2004.

Government's Second Appeal

Reviewing the sentence for unreasonableness under *Booker*, the court of appeals defined "the correct procedural approach" as using the Guidelines as the benchmark: courts should first calculate the applicable Guidelines sentencing range and then decide whether to impose a non-Guidelines sentence based on the other § 3553(a) factors. App. 8a. Acknowledging that the district court had followed this procedure, had "provided a detailed explanation of its reasons for not imposing the recommended guidelines sentence," and had "approached Thurston's sentencing with characteristic thoroughness," the First Circuit framed the case as "center[ing] not on the procedures employed, but on the substantive conclusion." App. 8a–9a. The court elaborated:

> In reviewing a particular sentence for reasonableness, we stress the need "for a plausible explanation and a defensible overall result." We also believe that the guidelines "remain[] an important consideration" in sentencing because they "represent[] the only integration of the multiple [sentencing] factors [set forth in § 3553(a)], often reflect past practice, and [bear] the imprimatur of the [Sentencing Commission], [the] expert agency charged with developing them." Thus, we consider the reasonableness of a below-guideline sentence on a sliding scale: "the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . ."

Id. (citations omitted).

The First Circuit disagreed with the length of the prison sentence (the "substantive conclusion") for three main reasons. First, the court ruled that § 3553(a)(6) does not support the sentence imposed. The First Circuit did not rely on the statutory language ("defendants with similar records who have been found guilty of similar

conduct"), but instead held that Isola and Thurston were not "similarly situated." App. 9a–12a. The First Circuit took the position that "[o]nce Thurston elected to go [to] trial, he was no longer situated similarly to Isola." App. 11a; *accord* App. 10a, 18a. Thus, in the appellate court's view, the district court was prohibited from tailoring Thurston's sentence to avoid what the district court found would be an unwarranted disparity with Isola's probationary sentence. The First Circuit dismissed any concerns about burdening Thurston's constitutional jury-trial right. App. 11a–12a. Second, the court of appeals believed that the district court did not give enough weight to the "seriousness of the offense" under § 3553(a)(2)(A). App. 12a–14a. Third, the court of appeals held that the district court erred in concluding the sentence was sufficient to serve the goal of general deterrence under § 3553(a)(2)(B). App. 14a–16a.

The First Circuit acknowledged the consistent sentences imposed by two different district judges, and conceded there were several facts—some of which previously could not be considered under the "mandatory" Guidelines regime in effect before *Booker*—that "support[ed] a below-guideline sentence." App. 16a. But in the court's view, those facts should be given less weight in the sentencing calculus. The court did not explain why it believed these facts justified only a "modest" variance from, or a "somewhat shorter" sentence than, the Guidelines range, App. 17a–18a, or what quantum of evidence would justify variances of particular lengths of prison time.

The court of appeals acknowledged that appellate courts are "not well-suited to determine *the* appropriate sentence for a defendant." App. 18a. Yet the court volunteered that it "would be inclined to impose a sentence at or near the guideline recommendation if it were acting as the sentencing court." App. 19a. Although typically the court would remand for resentencing, in this case, the court prospectively opined "that a sentence of fewer than 36

months' imprisonment would fail reasonableness review in the present circumstances." *Id.* The court instructed that "absent an extraordinary development, the [district] court must impose a sentence of no less than 36-months' imprisonment." *Id.*

Thurston had argued that sentence-enhancing facts must be proved beyond a reasonable doubt, and therefore applying 20 levels of Guidelines enhancements based on evidence which fell well short of that standard violated his constitutional rights. The court of appeals summarily dismissed that argument, App. 6a n.4, even while elsewhere stating that although the intended loss finding (made under a preponderance standard) and resultant 14-level enhancement "was sustainable, . . . the issue presented a somewhat close question," App. 17a.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Important Question Whether Facts That Increase a Defendant's Sentence Must Be Proved Beyond a Reasonable Doubt.

1. In the wake of *Booker*, this Court has yet to address whether the Fifth Amendment right to due process permits a court to increase a defendant's sentence based on facts found by a preponderance of the evidence or whether due process requires those facts to be proved beyond a reasonable doubt. Resolving this question is the next logical step in the progression from *Winship* to *Apprendi* to *Blakely* to *Booker*. The Court in *Booker* did not address whether increasing a sentence based on facts proved by a preponderance of the evidence violates the Fifth Amendment. Rather, the Court held only that excising the provision making the Guidelines mandatory (and an associated appellate review provision) remedied the violation of a defendant's Sixth Amendment right to jury trial. The standard of proof required by the Fifth Amendment remains an open question and is squarely presented in this case.

2. In *Apprendi v. New Jersey*, the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). *Apprendi*'s holding was based in part on the Fifth Amendment, which provides a constitutional protection "of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" *Id.* at 476.

The Court in *Winship* expressly acknowledged that the requirement of proof beyond a reasonable doubt is rooted in the Due Process Clause. *In re Winship*, 397 U.S. 358, 364 (1970). The Court explained that the reasonable-doubt standard plays "a vital role in the American scheme of criminal procedure" and "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. Because convictions bring a loss of liberty and a social stigma, the government should bear the risk of any error. *Id.* at 363–64. Under *Winship*, proof beyond a reasonable doubt is required for "every fact necessary to constitute the crime charged." *Id.* at 363.

Later cases "made clear beyond peradventure that *Winship*'s due process . . . protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 (citation omitted). *Mullaney v. Wilbur*, 421 U.S. 684 (1975), left no doubt that facts that increase punishment, not just those that go to guilt or innocence, must be proved beyond a reasonable doubt. In *Mullaney*, the Court unanimously held that due process required that the absence of heat of passion be considered an element of the offense of murder and thus be proved beyond a reasonable doubt. *Id.* at 691–92. The Court concluded that due process protects a defendant's interest in avoiding the greater penalties and consequences that attach to a murder as opposed to manslaughter conviction. *Id.* at 698.

The path from *Winship* to *Apprendi* was not entirely straight. In *McMillan v. Pennsylvania*, for example, the Court held that state legislatures may distinguish between elements of a crime and sentencing factors, with Fifth and Sixth Amendment protections attaching only to the former.[6] 477 U.S. 79 (1986).

In *Jones v. United States*, the Court construed certain provisions of a federal criminal statute to constitute elements of a crime rather than sentencing factors. 526 U.S. 227 (1999). Harking back to *Mullaney* and *Winship*, yet constrained by *McMillan*, the Court concluded that the doctrine of constitutional avoidance mandated this construction because of the constitutional problems that would ensue if the Court were to conclude otherwise. The Court explained that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6.

After the Court in *Apprendi* further distanced itself from the reasoning in *McMillan*, and reaffirmed the core animating principles of *Winship* and *Mullaney*, a plurality of the Court stepped back toward *McMillan* in *Harris v. United States*, 536 U.S. 545 (2002), concluding that the Constitution permits a mandatory minimum sentence to be imposed based on a fact found by a judge using a preponderance standard. The plurality's conclusion rested largely on categorizing the fact to be proven—brandishing

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[6] In *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam), the Court in *dictum* cited *McMillan* for the broad proposition that "the preponderance standard at sentencing generally satisfies due process." *Id.* at 156. But the Court had no call to wrestle with the due process concerns implicated by a preponderance standard because the case "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4.

a weapon—as a "sentencing factor." *Id.* at 558. As discussed below, the Court has since definitively rejected the notion that the label given to a factual finding determines whether the Fifth and Sixth Amendment are violated when a judge finds that fact by a preponderance.

In *Blakely v. Washington*, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. 296, 303 (2004). Consequently, the Court held that a sentence imposed under a state's determinate sentencing scheme based on facts found by the judge rather than by the jury violated the Sixth Amendment. The Court did not directly address the Fifth Amendment implications of imposing a sentence based on facts found by the judge by a preponderance of the evidence.[7]

In *United States v. Booker*, the Court held that the Guidelines sentencing scheme violated the Sixth Amendment by requiring judges to make factual findings that increased a defendant's sentence beyond that which would be imposed based on the facts found by the jury or admitted by the defendant. 543 U.S. 220 (2005). In the so-called "remedial" majority opinion, the Court held that excising the statutory provision making the Guidelines mandatory remedied this Sixth Amendment violation. *Id.* at 245. Although the majority did not address the Fifth Amendment right to due process, Justice Thomas, dissenting from the remedial opinion, stated: "The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the

[7] The protections provided by the Fifth and Sixth Amendments are distinct. *See Winship*, 397 U.S. at 364 (holding that due process required proof beyond a reasonable doubt even though no Sixth Amendment issue was presented); *Apprendi*, 530 U.S. at 476–77 (recognizing the distinct protections afforded by the Fifth and Sixth Amendments).

sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant." *Id.* at 319 n.6 (Thomas, J., dissenting).

That *Booker* requires the Guidelines to be treated as advisory rather than mandatory does not avoid the Fifth Amendment violation inherent in allowing a defendant's sentence to be increased based on facts found by the judge by a preponderance of the evidence. Even under an advisory Guidelines system, the courts still must determine, and review, sentences based on facts that may increase a defendant's sentence beyond that which would be imposed based on the facts found by the jury or admitted by the defendant.

The constitutional problem is not cabined to facts that would increase the Guidelines sentencing range; it extends to any fact that increases the sentence. But the constitutional problem is compounded when the Guidelines are weighted more heavily than other statutory factors that must be considered. Indeed, to the extent that appellate courts, in conducting review for unreasonableness, curb the district court's discretion by giving undue weight to the Guidelines, *see infra* Section II, applying a preponderance standard could violate the Sixth Amendment.

3. Although the courts of appeals have generally found that *Booker* does not require proof beyond a reasonable doubt,[8] neither *Booker* nor *Blakely* addressed whether Fifth

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[8] *See United States v. Yeje-Cabrera*, 430 F.3d 1, 17 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525–26 (2d Cir.), *cert. denied*, 126 S. Ct. 1665 (2006); *United States v. Morris*, 429 F.3d 65, 72 (4th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005); *United States v. Yagar*, 404 F.3d 967, 972 (6th Cir. 2005); *United States v. Price*, 418 F.3d 771, 788 (7th Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 551 n.4 (8th Cir.), *cert. denied*, 126 S. Ct. 266 (2005); *United States v. Magallanez*, 408 F.3d 672, 684–85 (10th Cir.), *cert. denied*, 126 S. Ct. 468 (2005); *United States v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir.), *cert. denied*, 126 S. Ct. 432 (2005). A Third Circuit decision, holding that defendants are not entitled to have sentence-enhancing facts proved beyond a reasonable doubt, has been vacated in light of a grant of rehearing *en banc*. *United States v. Grier*, 449 F.3d 558 (3d Cir.), *reh'g en banc granted, opinion vacated*, 453 F.3d 554 (3d Cir. 2006).

Amendment Due Process Clause requires the use of a reasonable-doubt standard. This Court, in the line of cases from *Winship* to *Apprendi*, recognized that due process may require proof beyond a reasonable doubt in sentencing.

In the aftermath of *Booker*, the Ninth and Tenth Circuits have recognized that using a heightened standard of proof may sometimes be appropriate in sentencing decisions. *See United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) (approving a district court's use of a heightened standard when assessing the reliability of the Guidelines range in particular cases); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2006) ("[W]hen a sentencing factor has an extremely disproportionate effect on the sentence . . . , the government may have to satisfy a clear and convincing standard." internal quotations omitted)).

Additionally, several district courts have held sentence-enhancing facts must be proved beyond a reasonable doubt. *See, e.g., United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027–29 & n.8 (D. Neb.), *aff'd*, Nos. 05-1448, 05-1633, 2005 WL 3440785 (8th Cir. Dec. 16, 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 153–54 (D. Mass. 2005).

This case presents an opportunity for the Court to decide the question left open by *Booker*: the standard of proof required for finding facts that increase a defendant's sentence under an advisory Guidelines system.

II. This Court Should Resolve the Important Question Whether the Sixth Amendment Permits an Appellate Court Reviewing a Sentence For Unreasonableness to Give the Guidelines Sentencing Range Greater Weight Than the Other 18 U.S.C. § 3553(a) Factors and to Give Less Deference to District Courts That Impose Sentences Outside That Range.

1. Part of *Booker*'s remedy for the recognized Sixth Amendment violation represented by the mandatory Guidelines regime was to excise 18 U.S.C. § 3553(b), which had required a district court to impose a sentence within

the Guidelines range unless the court found an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. *Booker*, 543 U.S. at 259–60. The Court also excised § 3742(e), which had been revised in 2003 to require *de novo* review of any departure from the Guidelines range, thus "mak[ing] Guidelines sentencing even more mandatory than it had been." *Id.* at 260–61. *Booker* thus made § 3553(a) the governing sentencing law, rendering the Guidelines "effectively advisory" rather than "mandatory." *Id.* at 245–46. *Booker* also prescribed a unitary standard of review for all sentences within or outside the Guidelines range, such that "[t]he courts of appeals review sentencing decisions for unreasonableness." *Id.* at 264.

Booker gave little guidance on what review for "unreasonableness" entails, except to refer generally to reasonableness standards in other contexts. *Booker*, 543 U.S. at 262–63. Nor did the Court give much guidance on what role the "advisory" Guidelines are to play on review of a district court's sentence. Justice Scalia expressed concern "that no one knows . . . how advisory Guidelines and 'unreasonableness' review will function in practice." *Id.* at 311 (Scalia, J., dissenting in part). More specifically, there was a concern that courts of appeals may "conclude . . . that little has changed" and "might seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the 'appellate sentencing practice during the last two decades.'" *Id.* at 311–12. Justice Scalia questioned whether "appellate review for 'unreasonableness' [would] preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges." *Id.* at 313.

2. Twenty months after *Booker*, these concerns have become manifest. The courts of appeals have articulated conflicting interpretations of the nature and scope of review for unreasonableness. Five circuits, including the First Circuit, have adopted a "sliding scale" rule, requiring

increasingly compelling justifications from (and consequently affording less deference to) the district court the farther a sentence departs from the Guidelines range—essentially creating a presumption of unreasonableness for outside-Guidelines sentences.[9] App. 9a; *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The Second Circuit, in contrast, has "yet to adopt this standard as a rule." *United States v. Rattoballi*, 452 F.3d 127, 134–35 (2d Cir. 2006). In effect, by affording the Guidelines unduly substantial weight in comparison to the other § 3553(a) factors and by affording less deference to district courts that impose sentences that vary from the Guidelines range, these courts have resurrected a sentencing scheme that resembles too closely the "mandatory" Guidelines scheme held unconstitutional in *Booker*. The First Circuit applied this type of unconstitutional scheme to Thurston in this case.

Although the First Circuit has nominally rejected a presumption of reasonableness for within-Guidelines sentences, *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), the court's rulings have gone even farther than other courts toward resurrecting the pre-*Booker* sentencing scheme. Even though the First Circuit "[does] not find it helpful to talk about the guidelines as 'presumptively' controlling," the court has stated that "[a]t the same time, the guidelines cannot be called just 'another factor' in the statutory list." *Id.* And despite

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[9] The courts of appeals are divided on the related question of whether there is a presumption of reasonableness for within-Guidelines sentences. As discussed *infra*, the First Circuit has nominally rejected a presumption of reasonableness, but the court's interpretation of its review authority, the weight it accords the Guidelines, and the lack of deference it gives to district judges who impose sentences outside the Guidelines range nevertheless conflicts with *Booker*.

the avowed rejection of a presumption, the First Circuit in *Jiménez-Beltre* characterized as "adroit" and "a more useful compass," *id.*, the district court's decision to give the Guidelines "substantial weight" and to depart from them only if "there [were] clearly identified and persuasive reasons," *id.* at 516–17.

The *Jiménez-Beltre* majority's semantic gymnastics drew a sharp dissent: "There is a significant difference between treating the guidelines as important and giving them substantial weight. There is scant difference between treating a guidelines sentence as presumptively controlling and stating that the court will depart from that sentence only for 'clearly identified and persuasive reasons.'" 440 F.3d at 524 (Lipez, J., dissenting). Judge Lipez expressed concern that the court "gave the guidelines a weight and a centrality that uncomfortably approximate the mandatory guidelines system that the Supreme Court found unconstitutional in *Booker*." *Id.* at 524–25. He pointed out that "there is no assumption [in § 3553(a)] that a guidelines sentence complies with the purposes of the sentencing statute" and "[a]s a matter of statutory construction, there is nothing in the language of [§] 3553(a) that justifies attributing to the guidelines 'substantial weight' in the sentencing decision." *Id.* at 526. Judge Lipez warned that "given the close divisions on the [Supreme] Court about the post-*Booker* role of the guidelines, and given the new composition of the Court, it would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines."[10] *Id.* at 528 n.11.

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[10] Informal evidence suggests that concerns about a *de facto* return to a mandatory Guidelines regime are well founded. See, e.g., Posting of Douglas A. Berman to Sentencing Law & Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/09/tracking_reason.html (Sept. 1, 2006), which presents a categorized list of published appellate decisions that review sentences for unreasonableness. This list, though not

(Continued on following page)

In cases after *Jiménez-Beltre*, the First Circuit has given increasingly more weight to the Guidelines, prompting another member of the court to dissent from the court's evolving unconstitutional doctrine. In *United States v. Navedo-Concepción*, 450 F.3d 54, 60 (1st Cir. 2006), the court affirmed a sentence where the district court had declared that "it will generally heel to the guidelines [when] imposing criminal punishment." Judge Torruella, dissenting, expressed concern that the First Circuit was "like a glacier in the ice age, inch by slow inch, regressing to the same sentencing posture we assumed before the Supreme Court decided *Booker*." *Id.* at 60 (Torruella, J., dissenting).[11]

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comprehensive, demonstrates a disturbing pattern in which reversals of below-Guidelines sentences (46 instances) and affirmances of above-Guidelines sentences (27 instances) far outnumber the reversals for above-Guidelines sentences (4 instances) and affirmances of below-Guidelines sentences (8 instances). *Id.* The affirmances of within-Guidelines sentences are depicted as "[f]ar too many to list" with only a single instance of a within-Guidelines sentence being reversed. *Id.*; *see also* U.S. Sentencing Comm'n, Final Report on the Impact of *United States v. Booker* on Federal Sentencing 30 (Mar. 2006) (indicating a similar distribution of appellate outcomes).

[11] The substantial weight accorded to the Guidelines puts the First Circuit squarely at odds with the reasoning of sister circuits that have rejected a presumption of reasonableness. For example, the Eleventh Circuit reasoned that "a district court's determination that the Guidelines range fashions a reasonable sentence, necessarily must be a case-by-case determination" and therefore "[s]o long as the district court considers the Guidelines, we do not believe it is appropriate to dictate a 'strength' of consideration applicable in every case." *United States v. Hunt*, No. 05–11671, 2006 WL 2285715, at *3–4 (11th Cir. Aug. 10, 2006). Similarly, the Ninth Circuit explained that "[d]istrict courts neither should, nor can, ignore [their post-*Booker* discretion] by placing undue weight on the Guideline portion of the sentencing chemistry" and "must not accord [the Guideline calculation] greater weight than they accord the other § 3553(a) factors." *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006).

In this case, the First Circuit has moved yet closer to replicating *de facto* the mandatory sentencing scheme that *Booker* held unconstitutional. Under the guise of review for unreasonableness, the First Circuit dictated a substantive result to the district court, remanding with an explicit mandate to impose a sentence of at least three years' imprisonment. The First Circuit made clear this was only "the minimum sentence" and "this court would be inclined to impose a sentence at or near the guideline recommendation [of five years]." App. 19a. The First Circuit gave substantial weight to the Guidelines "because they 'represent[] the only integration of the multiple [sentencing] factors [set forth in § 3553(a)], often reflect past practice, and [bear] the imprimatur of the [Sentencing Commission], [the] expert agency charged with developing them.'" App. 8a–9a (quoting *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006)). Moreover, the court articulated a "sliding scale" approach to reviewing the "reasonableness" of the district court's "below-guideline sentence": "'the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . .'" App. 9a (quoting *Smith*, 445 F.3d at 4 (quoting *Dean*, 414 F.3d at 729)).

The First Circuit's deference to the Guidelines range and its "sliding scale" rule for justifying departures from the Guidelines range too closely resemble the "mandatory" or "presumptive" regime held unconstitutional in *Booker*. Its "sliding scale" doctrine is, in function, akin to a presumption of unreasonableness for outside-Guidelines sentences. The doctrine gives the Guidelines range, calculated based on facts found by a judge by a preponderance of the evidence, a centrality and weight that impermissibly burdens a defendant's Sixth Amendment jury-trial rights. Further, the First Circuit's interpretation of its review power more closely resembles the substantive *de novo* review of departures from the otherwise "mandatory" Guidelines range that existed before § 3742(e) was excised in *Booker* than a deferential review of a district court's

sentencing decision under an "advisory" Guidelines system.

This Court should grant a writ of certiorari to provide guidance on the proper weight to be given the advisory Guidelines range and the degree of deference to be given outside-Guidelines sentences when appellate courts review sentences for unreasonableness. This case provides an excellent vehicle for doing so because of the carefully developed record in the district court and the substantial discussion of the relevant issues in the First Circuit.

III. The Writ Should Be Granted to Resolve Fundamental Issues Regarding District Courts' Discretion Under 18 U.S.C. § 3553(a) to Avoid Unwarranted Disparities Between Codefendants' Sentences.

1. When fashioning a sentence for a defendant, a sentencing court must consider all of the factors under 18 U.S.C. § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6). Here the sentencing court extensively analyzed Thurston and codefendant Isola, and concluded that § 3553(a)(6) applied and should be a significant consideration, among other factors, in determining the appropriate sentence. *Supra* at 7–9. The defendants had "similar records" (in Criminal History Category I, with no prior history) and were "found guilty of similar conduct" (a conviction under § 371 for the same conspiracy, based on business practices when they were both Damon executives during the same years). The main difference between Thurston and Isola was that Isola pleaded *nolo contendere* (and, notably, did not cooperate with the government), whereas Thurston went to trial. *Supra* at 8–9. The sentencing court found that Isola was *more* culpable than Thurston, and rejected the government's argument that Thurston had committed perjury at trial. *Supra* at 6–8.

The court of appeals did not rely on the statutory language ("defendants with similar records who have been found guilty of similar conduct"), but instead held that Isola and Thurston were not "similarly situated." App. 9a–12a. The First Circuit took the position that "[o]nce Thurston elected to go [to] trial, he was no longer situated similarly to Isola." App. 11a. Therefore, in the First Circuit's view, the district court was prohibited from tailoring Thurston's sentence to avoid what the district court found would be an unwarranted disparity with Isola's probationary sentence.[12]

This case thus presents an important issue of statutory interpretation, namely, whether the phrase "defendants with similar records who have been found guilty of similar conduct" in § 3553(a)(6) does not apply merely because one defendant was convicted at trial and his codefendant was convicted after pleading *nolo contendere*. The statute's meaning is plain, and the First Circuit's conclusion rests on a nonsensical reading, in conflict with this Court's statutory construction doctrine. *E.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (citations and quotations marks omitted)).

2. Encompassing this specific statutory interpretation issue is a broader issue regarding a sentencing court's

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[12] The First Circuit reached this decision despite the government's express concession in the district court that the sentencing disparity between Isola and Thurston could be considered under § 3553(a)(6) because they were codefendants convicted of the same crime. In briefing on appeal, the government conceded its forfeiture of any contrary argument, though it disputed Thurston's claim of waiver. Reply Br. for Gov't 3 & n.2, Apr. 13, 2006. The First Circuit did not expressly address waiver or forfeiture, nor did the court articulate its reasoning in terms of plain-error review.

discretion to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar.

It has long been recognized that since passage of the Sentencing Reform Act there has been an unintended but substantial shift in discretion and authority from district courts to prosecutors.[13] Under the mandatory Guidelines system, when the exercise of prosecutorial discretion (such as charging or plea-bargaining practices) would occasionally result in unfair prejudice to an individual defendant, a district court had little power to remedy it, except in the limited circumstances in which there was legal authority to depart from the Guidelines range.[14] The change to an advisory Guidelines system following *Booker* has not restored the balance of power or eliminated unfairness to defendants in the sentencing system.

Both the remedial majority and dissenting opinions in *Booker* voiced related concerns, albeit in a different context, about plea bargaining and the balance of power

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[13] Fed. Courts Study Comm., Report of the Federal Courts Study Committee 138 (Apr. 2, 1990) ("[T]he rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system. . . . [S]ome prosecutors (and some defense counsel) have evaded and manipulated the guidelines in order to induce the pleas necessary to keep the system afloat . . . .").

[14] Yet as the Commission has explained, adherence to the Guidelines does not necessarily avoid unwarranted sentencing disparity. "[S]ome of the components of guidelines implementation that were designed to ensure uniformity have proven inadequate to the task or have not worked as intended." U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing 82 (Nov. 2004). For example, "a variety of evidence suggests that disparate treatment of similar offenders is common at presentencing stages," *id.* at 92, and "several lines of evidence suggest that uneven charging and plea bargaining remain a source of unwarranted sentencing disparity," *id.* at 141.

between prosecutors and sentencing courts. The remedial majority stated that Congress intended "to increase the likelihood that offenders who engage in similar real conduct would receive similar sentences," which is important to plea bargaining because such bargaining "takes place *in the shadow of* (*i.e.*, with an eye towards the hypothetical result of) a potential trial." *Booker*, 543 U.S. at 255. The remedial majority was concerned that if prosecutors could decide which sentencing factors "would be placed beyond the reach of the judge entirely," prosecutors would usurp "[judicial] power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment." *Id.* at 256–57. The dissenting justices also emphasized the importance of "certainty of expectations in the plea process." *Id.* at 289 (Stevens, J., dissenting). The dissent noted the shift in power from judges to prosecutors, and emphasized the problem of "fact bargaining[,] [which is] quite common under the current system." *Id.* at 290 & n.11 (citing authorities).

This case brings these longstanding concerns into bold relief. At Isola's sentencing, armed with the same information as it had later at Thurston's sentencing, the government agreed to what it knew would be a probationary sentence, and agreed not only to waive its right to appeal, but also to forgo a presentence report, which would have addressed whether any enhancements were warranted.[15] *Supra* at 2–3. Isola was not required to cooperate as a condition of his plea agreement and, accordingly, the government did not seek a substantial-assistance departure. *Supra* at 3.

As the district court found, the government implicitly represented that a probationary sentence was sufficient to promote the statutory purposes of § 3553(a)—including

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[15] The government joined in Isola's "waiver" of a presentence report, even though Congress had long ago abolished the right to waive the requirement. U.S.S.G. § 6A1.1 & cmt.

the need to reflect the seriousness of the offense and to afford adequate deterrence—and would not perpetuate unwarranted disparity. *Supra* at 9. As the government explained, it believed that obtaining a conviction, in and of itself, would send a deterring message to others. App. 210a, 217a; Opening Br. for Gov't, Jan. 30, 2006. There was also an implicit representation that the government would claim no enhancements, such as actual or intended loss, associated with the individual coconspirators' "relevant conduct."[16] If the prosecutors believed there was loss associated with the coconspirators' conduct, they were obligated to bring that information to the court's attention at Isola's sentencing.[17]

The Commission believed "[r]eliable fact-finding" to be a core value of the Guidelines system because it "is essential to procedural due process and to the accuracy and uniformity of sentencing." U.S.S.G. ch. 6, pt. A, introductory cmt. The system was intended to have a "rationalizing impact" on plea bargaining by "creat[ing] a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place." *Id.* ch. 1, pt. A, introductory cmt. Even as prosecutors' discretion in

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[16] *See* U.S.S.G. § 1B1.3(a) ("relevant conduct" includes acts and omissions of defendant as well as others in furtherance of conspiracy, and all resulting or intended harm); *id.* § 1B1.3, cmt. background (conduct not formally charged or not element of offense may enter into sentencing); *id.* § 2F1.1, cmt. n.6 (cumulative loss produced by common scheme should be used in determining offense level).

[17] *See* U.S.S.G. § 6B1.4(a) (stipulation of facts accompanying plea agreement must set forth relevant facts and circumstances of actual offense conduct, and must not contain misleading facts); *id.* § 6B1.4(b) & cmt. (parties should fully disclose actual facts, and then explain to court why disposition of the case should differ from that which such facts ordinarily would require under Guidelines); *id.* § 6B1.2(a) & cmt. (even when plea agreement includes dismissal of charge, may not restrict scope of relevant conduct); *id.* § 1B1.8, cmt. n.1 (even when cooperation agreement provides that self-incriminating information will not be used in calculating sentence, government not authorized to withhold information from court).

plea bargaining has expanded, as the district court noted, the government shares responsibility with the court for ensuring there is no unwarranted disparity. App. 218a. That responsibility does not "cease[] upon the . . . entry of a guilty plea; to the contrary, the [prosecutor] has a continuing obligation to assist the court in its determination of the sentence to be imposed." U.S. Dep't of Justice, *United States Attorneys' Manual* 9-27.710 (2d ed. 2000 & Supp. 2002-1).[18] In this case, the prosecutors disregarded their obligations at Isola's sentencing to secure an early felony conviction by plea, only to change tactics at Thurston's sentencing and argue a litany of sentence-enhancing facts, effectively punishing him more severely for declining the plea offer and exercising his right to trial.

The district court believed it had ample discretion to tailor a sentence for Thurston that varied substantially from the Guidelines range urged by the government. The court explained that for Thurston to suffer a sentence any greater than six months' confinement and a $25,000 fine would constitute an "unwarranted sentence disparit[y]," 18 U.S.C. § 3553(a)(6). *Supra* at 7–9. Further, the court considered "the need for the sentence imposed . . . to promote respect for the law," 18 U.S.C. § 3553(a)(2)(A), and found that any greater sentence not correcting for this unwarranted disparity would undermine respect for the law. Additionally, the court reasoned that Congress did not intend to authorize disparity resulting solely from the conduct of prosecutors in the exercise of their discretion, with no material differences between defendants, nor did it intend to shift

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[18] *See also id.* 9-27.710 (prosecutors should assist court by attempting to ensure relevant facts are brought to court's attention fully and accurately); *id.* 9-27.400 (plea bargaining must honestly reflect totality and seriousness of defendant's conduct and any departure to which prosecutor agrees); *id.* (total amount of money involved in fraudulent scheme considered even if defendant pleads guilty to single count); *id.* (spirit of Guidelines and Department policy violated if plea bargain based on prosecutor's and defendant's agreement that departure is warranted, but prosecutor does not reveal it to court).

this sort of discretion from judges to prosecutors. *Supra* at 9.

The First Circuit concluded that under § 3553(a)(6), a disparity of five years' imprisonment was warranted as a matter of law based on the sole fact that Isola pleaded *nolo contendere* and Thurston went to trial.[19] App. 9a–12a. Yet the First Circuit also acknowledged that the sentencing disparity between Isola and Thurston "could justify a somewhat reduced sentence" under § 3553(a)(2)(A) because "*too* wide a divergence between the sentence imposed on Isola and Thurston could negatively affect the public's 'respect for the law'" and could "undermine the accepted notion that similar conduct should be punished in a somewhat similar manner." App. 18a. Despite the public disrespect it would engender, the court of appeals' holding under § 3553(a)(6) has taken away district courts' discretion to find such disparity unwarranted and to act to avoid it.

The Court in *Booker* emphasized that the advisory Guidelines system would "maintain[] flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65. The Court should now put flesh on the bones of that statement and make clear that district courts have discretion under § 3553(a) to fashion an individualized, just

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[19] This case may also give occasion to clarify whether a district court's discretion to mitigate sentencing disparities overlaps with this Court's doctrine on prosecutorial and judicial vindictiveness under the Due Process Clause. Although this case may well present facts that would give rise to a presumption of prosecutorial vindictiveness under the principles set forth in this Court's decisions, *see, e.g.*, *Alabama v. Smith*, 490 U.S. 794 (1989); *United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Blackledge v. Perry*, 417 U.S. 21 (1974), the First Circuit erred by effectively limiting the circumstances in which a district court has discretion to reduce codefendant sentencing disparities under § 3553(a) to circumstances that otherwise would give rise to a presumption of vindictiveness. *See* App. 10a–11a (citing, *inter alia*, *Alabama v. Smith*, 490 U.S. 794; *Bordenkircher v. Hayes*, 434 U.S. 357).

sentence that varies substantially from the Guidelines range when necessary to prevent unwarranted disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleads *nolo contendere* but is otherwise similar.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 06-378

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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456 F.3d 211

United States Court of Appeals, First Circuit.
UNITED STATES of America, Appellant,
v.
William THURSTON, Defendant, Appellee.
No. 05-2271.

Heard May 5, 2006.
Decided July 26, 2006.

Michael K. Loucks, First Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, Dina Michael Chaitowitz, Chief of Appeals, and Susan G. Winkler, Chief, Health Care Fraud Unit, were on brief, for appellant.

Joseph P. Russoniello, with whom Matthew D. Brown and Cooley Godward LLP were on brief, for appellee.

Daniel J. Popeo and Paul D. Kamenar, on brief for Washington Legal Foundation and Allied Educational Foundation, Amici Curiae.

Miriam Conrad, Federal Public Defender and Judith Mitzner, Assistant Federal Public Defender, on brief for The Federal Public Defender for the Districts of Massachusetts, New Hampshire, and Rhode Island, Amicus Curiae.

Before BOUDIN, Chief Judge, LYNCH and HOWARD, Circuit Judges.

HOWARD, Circuit Judge.

William Thurston was convicted of conspiring to defraud Medicare of over $5,000,000. Although the recommended sentence under the sentencing guidelines was 60 months' imprisonment, the district court instead

imposed a sentence of three months' imprisonment. The government appeals, arguing that the sentence is unreasonable. The relevant background is as follows.

In 1998, Thurston was indicted for conspiring to commit Medicare fraud. *See* 18 U.S.C. § 371. The indictment stemmed from Thurston's activities in the late 1980s and early 1990s as an executive for Damon Clinical Laboratories (Damon), a corporation that supplied clinical laboratory testing services for health care providers. Medicare reimburses clinical laboratories only for services that are medically necessary for the treatment of the beneficiary's illness or condition. 42 U.S.C. § 1395(a)(1)(A). Thurston was indicted for conspiring with three others to manipulate Damon's service options to encourage physicians to order unnecessary tests for Medicare beneficiaries. In particular, the indictment charged Thurston with conspiring to induce physicians to order rarely needed tests for ferritin and apolipoprotein by making them part of a battery of frequently ordered tests and informing physicians, falsely, that the tests did not cost extra.

Prior to trial, the trial judge expressed skepticism about the government's case. At an April 2000 status conference for codefendant Joseph Isola, Damon's president, the judge stated that he would be inclined to impose a probationary sentence, even if the government could gain a conviction. Aware that the judge had more than once granted unappealable acquittals in similar cases, the government viewed its likelihood of gaining convictions and long sentences as remote. It therefore offered generous plea agreements to each of the defendants. In exchange for a plea of nolo contendere to a one-count information, the government offered to dismiss the indictment and not to

appeal the sentence imposed (which the judge had indicated would not involve imprisonment).

Isola accepted the government's offer, but Thurston and another codefendant declined.[1] Thurston rejected the offer because a guilty plea "would cause him to be shunned in the Mormon church." At Isola's sentencing hearing, the government did not recommend a sentence, and the judge imposed a three-year term of probation. Subsequently, the trial of Thurston's remaining codefendant ended when the judge entered a judgment of acquittal pursuant to Fed.R.Crim.P. 29. In December 2001, Thurston was convicted by a jury of conspiring to defraud Medicare by inducing the unnecessary ordering of the ferritin test.[2]

Thurston was first sentenced in May 2002. Applying the sentencing guidelines, the judge determined that the base offense level was six, that Thurston intended to defraud Medicare of more than $5,000,000 (a 14-level enhancement), that the crime involved more than minimal planning (a two-level enhancement), and that Thurston was an organizer or leader of extensive criminal activity (a four-level enhancement). The judge denied Thurston's request for an acceptance-of-responsibility adjustment and did not rule on the government's request for an obstruction-of-justice enhancement. The resulting adjusted offense level of 26 established a sentencing range of 63 to 78 months, which was trumped by a 60-month statutory maximum.

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[1] In the interim, the fourth codefendant died.

[2] The judge entered a Rule 29 judgment of acquittal on the apolipoprotein charge.

The judge departed from the guideline range and imposed a sentence of three months' imprisonment and twenty-four months' supervised release. He granted this departure for two reasons. First, he found that imposing a 60-month sentence on Thurston would result in an untoward disparity with the probationary sentence imposed on Isola, whom the court characterized as "the prime architect of the conspiracy." Second, he concluded that Thurston had demonstrated a record of "extraordinary contributions and service to society, and especially to his religious obligation."

Thurston appealed his conviction and the government cross-appealed the sentence. We affirmed the conviction but remanded for resentencing. *See United States v. Thurston,* 358 F.3d 51 (1st Cir. 2004) (*Thurston I*). Under the federal sentencing regime then in place, the sentencing court was required to impose a guideline sentence unless a downward departure was permitted.[3] *See* 18 U.S.C. § 3553(b). We concluded that the district court erred by granting Thurston a downward departure so that his sentence would be similar to Isola's. *Thurston,* 358 F.3d at 79. We ruled that a departure could not be granted because of the "perceived need to equalize sentencing outcomes for similarly situated co-defendants. . . ." *Id.* We also concluded that the court had improperly granted Thurston a downward departure because of his good works. The guidelines permitted such departures only in cases where the defendant's good works "were exceptional." *Id.* at 78-79. While Thurston had a history of good

[3] At that time, we reviewed decisions to grant downward departures de novo. *See* 18 U.S.C. 3742(e), as amended by Pub.L. No. 108-21, § 401.

works, such efforts could not be deemed extraordinary in light of both the nature of the offense and Thurston's status as a corporate executive with the means to undertake significant charitable endeavors. *Id.* at 79-80. We therefore remanded with instructions that the guideline sentence of 60-months' imprisonment be imposed. *Id.* at 82.

Thurston filed a petition for a writ of certiorari with the United States Supreme Court. While Thurston's petition was pending, two relevant events occurred. First, the trial judge recused himself because he could not impose the sentence "prescribed by the Court of Appeals." Second, the Supreme Court decided *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which replaced the mandatory guideline regime with an advisory system. The Supreme Court subsequently granted Thurston's petition, vacated this court's judgment, and remanded for further consideration in light of *Booker. Thurston v. United States,* 543 U.S. 1097, 125 S.Ct. 984, 160 L.Ed.2d 988 (2005). After additional briefing, we remanded for resentencing and ordered that the court consider whether an obstruction-of-justice enhancement should be applied to Thurston's guideline range.

Following the reassignment of the case to the district court judge who issued the sentence challenged in this appeal, Thurston argued that he should receive the original sentence imposed because "unwarranted disparities between codefendants" and "good works" could be considered post-*Booker.* The government responded that Thurston should receive the 60-month sentence contemplated in *Thurston I.*

The district court expeditiously convened a hearing to determine Thurston's sentence. It began its analysis by

accepting the findings made during Thurston's original sentencing and concluded that an obstruction-of-justice enhancement was not warranted.[4] After determining that the recommended guideline sentence was 60 months, the court considered whether a lower sentence was appropriate under the sentencing factors set forth in 18 U.S.C. § 3553(a). Among these factors are the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to afford adequate deterrence, and to avoid unwarranted sentence disparities among defendants who have similar records and who have been found guilty of similar conduct. *Id.* § 3553(a)(2),(6).

The court began by finding that the disparity between Isola's sentence and Thurston's recommended sentence was unacceptable. As the court explained:

> Giving the prime architect of the scheme in this case [Isola] a sentence of probation and giving Mr. Thurston a sentence of 60 months, as the government advocates because he rejected a similar deal and exercised his right to a trial, would greatly injure respect for the law unless the disparity is warranted by some legitimate consideration.

Concluding that there were no material differences between Thurston and Isola other than Thurston's decision to exercise his right to a trial, the court ruled that

---

[4] Thurston argues that the district court was wrong to accept the enhancements imposed in the first sentencing on the ground that *Booker* raises the standard of proof for imposing guidelines enhancements from a preponderance of the evidence to beyond a reasonable doubt. We have rejected this argument. *E.g.*, *United States v. Yeje-Cabrera*, 430 F.3d 1, 17 (1st Cir. 2005); *United States v. Antonakopoulos*, 399 F.3d 68, 80 (1st Cir. 2005).

this difference called for only a modest increase in Thurston's sentence: three-months' imprisonment.

The court next considered whether imposing a three-month sentence would adequately reflect the seriousness of Thurston's crime. It again viewed Isola's plea agreement and the similar offer to Thurston as the benchmark. According to the court, "implicit in the Isola plea agreement, and the same agreement or opportunity being offered to Mr. Thurston, was the government's view that the probationary sentence was minimally adequate . . . to reflect the seriousness of the offense." The court further explained:

> Medicare fraud . . . is a serious crime. And frequently . . . both the Guidelines and the government's recommendations are too low in white collar cases. However, the government's plea bargain with Isola and the offer it made to Mr. Thurston of . . . a probationary sentence are evidence that even a probationary sentence would adequately reflect the seriousness of the offense in this case.

Finally, the court considered whether a three-month sentence would adequately deter other potential white collar criminals. It concluded that a short prison term was adequate to serve this goal because "the most significant decision in sending a message to potential white collar criminals is the decision to send the defendant to prison. It's not so much the amount of time, it's whether you go away."

After discussing the above-mentioned § 3553(a) factors, the court sentenced Thurston to essentially the

same sentence initially imposed – three months' imprisonment and 24 months' supervised release.[5] Because Thurston received credit for time served, the sentence did not require Thurston to serve any additional prison time.

The government appeals, arguing that the district court placed too much emphasis on the disparity between Isola's and Thurston's sentences. The government also argues that the court unreasonably undervalued the seriousness of Thurston's offense and the need to deter other white collar criminals.

Thurston's sentencing took place prior to our decision prescribing the post-*Booker* sentencing process. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 518-19 (1st Cir. 2006) (en banc). Nevertheless, the district court anticipated the correct procedural approach. It calculated the applicable guideline range "before deciding whether to exercise [its] new-found discretion to impose a non-guidelines sentence" based on the § 3553(a) sentencing factors. It also provided a detailed explanation of its reasons for not imposing the recommended guidelines sentence. *Id.* The dispute in this case centers not on the procedures employed, but on the substantive conclusion.

In reviewing a particular sentence for reasonableness, we stress the need "for a plausible explanation and a defensible overall result." *Id.* at 519. We also believe that the guidelines "remain[] an important consideration" in sentencing because they "represent[] the only integration of the multiple [sentencing] factors [set forth in § 3553(a)], often reflect past practice, and [bear] the imprimatur of

[5] The court added a $25,000 fine which was not part of the initial sentence.

the [Sentencing Commission], [the] expert agency charged with developing them." *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006). Thus, we consider the reasonableness of a below-guideline sentence on a sliding scale: "the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . ." *Id.* (quoting *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005)).

Here, the district court imposed a sentence 95% below the incarceration period recommended by the guidelines for essentially three reasons: (1) Thurston should receive a sentence close to Isola's because they are similarly situated codefendants and a wide disparity in their sentences would punish Thurston for electing to go to trial; (2) Thurston's offense was not terribly serious, as evidenced by the government's pretrial plea offer of a probationary sentence; and (3) a short prison term serves the interest of general deterrence because white collar criminals typically are more concerned about whether they will be sent to prison than the length of imprisonment. The court approached Thurston's sentencing with characteristic thoroughness and without the benefit of our recent decisions applying *Booker*. We are constrained, however, to conclude that these reasons do not warrant the major variance challenged in this case.

We begin by considering the disparity between Isola and Thurston. In the pre-*Booker* era, codefendant disparities could not support a sentence below the guideline range. *See United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991). But after *Booker* "that a factor [was] discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing the statutory factors apart from the guidelines." *Smith*,

445 F.3d at 5. That said, since *Booker*, we have observed that § 3553(a)(6) – the factor relating to sentencing disparities – was "almost certainly" enacted by Congress to encourage "a national uniformity focusing upon a common standard and looking to how most cases of the same kind were treated." *United States v. Saez*, 444 F.3d 15, 18 (1st Cir. 2006); *see also United States v. Navedo-Concepcion*, 450 F.3d 54, 59 (1st Cir. 2006) ("Congress's concern with disparities was mainly national"); *Smith*, 445 F.3d at 5 ("Congress' goal of equality primarily envisions a national norm"). Thus, one possible problem with the court's rationale was the emphasis on disparities between codefendants without giving significant consideration to encouraging nationwide uniformity in sentencing – the primary focus of § 3553(a)(6). But, even if the emphasis on codefendant disparity was appropriate, Isola and Thurston were not so similarly situated that nearly identical sentences were warranted. *See United States v. Ortiz-Torres*, 449 F.3d 61, 85 (1st Cir. 2006). In our view, the district court undervalued the fact that Isola pleaded nolo contendere.

"Plea bargaining flows from the mutuality of advantage to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). In order to gain a conviction without risking an unsuccessful trial, prosecutors frequently discount the sentence they offer in a plea bargain by the probability of loss. *See* Albert W. Aschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L.Rev. 50, 58-60 (1968) (stating that "the overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining"); Stephanos

Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 Harv. L.Rev. 2463, 2470 (1994) ("The strength of the prosecution's case is the most important factor" in plea bargaining).

The record supports the government's argument that this is why Isola and Thurston were offered such favorable plea agreements. As noted above, the trial judge expressed doubts about the government's case and an inclination to impose a probationary sentence even if the government gained a conviction. Moreover, the government believed that the trial judge had a history of granting acquittals in similar cases.

Thurston had the opportunity to accept this offer but declined. Thurston's decision to go to trial entailed the risk of a stiffer post-conviction punishment. *See Yeje-Cabrera,* 430 F.3d 1, 25 (1st Cir. 2005). This is so because "after trial, the factors that may have indicated leniency as a consideration for the guilty plea are no longer present." *Alabama v. Smith,* 490 U.S. 794, 801, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Once Thurston elected to go [to] trial, he was no longer situated similarly to Isola. The primary factor that led to Isola's light sentence – the government's concern that it would not prevail at trial – was no longer present.

The district court declined to consider this distinction material because, in its view, imposing a substantially harsher penalty on Thurston would impose a burden on Thurston's exercise of his constitutional right to a jury trial.[6] The law does not support this conclusion. "The fact

[6] The court did conclude that a small increase in Thurston's sentence was appropriate because his decision to go to trial caused additional expenditures by the government.

that the defendant who pleads gets a benefit over those who go to trial and are convicted is a necessary artifact of any plea bargaining regime. The law long ago determined that there was nothing . . . illegal about any burden on trial rights caused by such a differential." *Yeje-Cabrera*, 430 F.3d at 25. In short, there was too much emphasis placed on Isola's sentence in determining the appropriate imprisonment period for Thurston. *Cf. Navedo-Concepcion*, 450 F.3d 54, 2006 WL 1575573, at *5. (concluding that the district court was reasonable in sentencing a defendant who went to trial to a longer sentence than codefendants who pleaded guilty because "defendants who plead guilty often get . . . lower sentences").

We turn next to whether a three-month sentence adequately reflected the seriousness of Thurston's crime. In considering this sentencing factor, the district court indicated that it agreed with our observation in *Thurston I* that "[h]ealth care fraud is a serious crime and the federal interest in combating it is powerful." 358 F.3d at 81. Nevertheless, the court concluded that a three-month sentence was appropriate because it represented the government's view of the seriousness of the offense. To reach this conclusion, the court relied on a sentencing guideline policy statement requiring that plea negotiation practices be conducted to "promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a)." U.S.S.G. Part B, Intro. Comment. The court interpreted this policy statement to mean that, whenever the government offers a plea bargain, it is implicitly certifying that the proposed sentence adequately reflects the seriousness of the offense.

Sentencing is "primarily a judicial function." *United States v. Mistretta*, 488 U.S. 361, 390, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). This was the law both before and after

the promulgation of the sentencing guidelines. *See* U.S.S.G. Part B, Intro ("[S]entencing is a judicial function. . . . This is a reaffirmation of a pre-guidelines practice."); S.Rep. 98-225 at 159, *reprinted in* 1984 U.S.C.C.A.N. 3342 (stating that placing the Sentencing Commission in the judicial branch was based on the understanding that "sentencing should remain primarily a judicial function"). Sentencing remains a judicial function post-*Booker*. *See Jimenez-Beltre,* 440 F.3d at 518-19.

Judicial independence in sentencing is reflected in the rule governing the acceptance of pleas. Under Fed.R.Crim.P. 11(c)(3)(a), a sentencing court is empowered to reject any plea agreement which binds the court to impose a specific sentence if the court deems the sentence inappropriate. *See* C. Wright, *Federal Practice & Procedure,* § 175.1 at n. 38 (3d ed.1999) (citing cases in which courts declined to accept plea agreements because of a disagreement with the agreed-to sentence). Post-*Booker* cases also emphasize the sentencing court's obligation independently to consider the § 3553(a) factors in arriving at the appropriate sentence. *See United States v. Buchanan,* 449 F.3d 731, 740 (6th Cir. 2006) (stating that courts must exercise "independent judgment" in imposing sentence); *United States v. Cooper,* 437 F.3d 324, 329 (3d Cir. 2006) (stating that courts must give "meaningful consideration to the § 3553(a) factors").

The government's lenient pretrial offer to Thurston did not relieve the district court of its independent obligation to assess the seriousness of Thurston's offense. The court suggested that the government undervalued the seriousness of Thurston's crime through its pretrial offer and then mistakenly deferred to its perception of the government's pretrial position. *See United States v.*

Lazenby, 439 F.3d 928, 934 (8th Cir. 2006) ("Under the Sentencing Reform Act and *Booker* sentencing discretion rests in the final analysis with the sentencing judge, not with the prosecution."); *United States v. Escobar Noble,* 653 F.2d 34, 36 (1st Cir. 1981) ("It is the particular function of the court, not the prosecutor, to say the last word about the justice of a sentence."). While the government's pretrial position might be relevant, a sentencing court ought not simply defer to the government's pretrial position, without taking into account the court's own expressed misgivings about the government's view or the government's explanation for its change in position.

Finally, we address the district court's deterrence rationale. As set forth above, the court concluded that a sentence imposing substantial prison time on Thurston would not promote general deterrence because white collar defendants typically are more concerned about whether they will go to prison than with the actual length of imprisonment.

This rationale is problematic in light of our recent post-*Booker* pronouncements. "The clear import of the statutory [sentencing] framework is to preserve Congress's authority over sentencing policy and to guarantee that the exercise of judicial discretion over sentencing decisions be based on case-specific circumstances, not on general, across-the-board policy considerations." *United States v. Pho,* 433 F.3d 53, 62 (1st Cir. 2006). Accordingly, post-*Booker,* "general disagreement with the broad-based policies enunciated by Congress or the Commission" do not justify imposing a sentence that is below the recommended guideline range. *Id.* at 65.

"One of the goals of the entire guidelines regime was to minimize discrepancies in the treatment of 'white collar' and 'blue collar' offenses." *Thurston I,* 358 F.3d at 80. From the outset of the guideline regime, the Sentencing Commission determined that the penalties for white collar crime had to be increased because of the inequity in the pre-guideline sentencing practice of "punishing economic crimes less severely than other apparently equivalent behavior." U.S.S.G., ch. 1, pt. A, § 3. In recent years, Congress has expressed concern that punishments for white collar offenses were too lenient. In 2002, Congress enacted the White Collar Crime Penalty Enhancements Act which, *inter alia,* instructed the Sentencing Commission to consider whether the sentencing "guidelines and policy statements . . . are sufficient to deter . . . [white collar] offenses" and to "modify the sentencing guidelines" accordingly. *See* Pub.L. No. 107-204, § 905(b)(1),(2). In response, the Commission increased the penalties and enhancements for certain white collar offenses. *See* 68 Fed.Reg. 2615-01 (2003); *see also* U.S.S.G. § 2B1.1 (2001) (setting forth the 2001 economic crime sentencing reforms which increased the guideline penalties and enhancements for white collar offenses).

The district court is not alone in viewing long prison sentences as unnecessary to deter white collar crimes. *See, e.g., United States v. Yeaman,* 248 F.3d 223, 238 (3d Cir. 2001) (Nygaard, J., dissenting in part); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment & the Theory of Deterrence,* 28 J. Leg. Stud. 1, 12 (1999). But, as expressed through the recommended guideline offense levels, this view is not shared by "Congress or the Commission, as its agent." *Pho,* 433 F.3d at 65.

A court may sentence below the guidelines because the guideline sentence appears unreasonable in the "particular case[]," *Jimenez-Beltre*, 440 F.3d at 518, but not because of "general disagreement with broad-based policies enunciated by Congress or the Commission." *Pho*, 433 F.3d at 65. Here, the court pointed to no facts concerning Thurston's offense or individual circumstances indicating that a three-month sentence would adequately deter similar crimes. *Cf. United States v. Rattoballi*, 452 F.3d 127, 136 (2d Cir. 2006) (concluding that a below-guideline sentence for a white collar defendant was unreasonable where the district court imposed a lenient sentence based on characteristics common to all white collar defendants). Therefore, this was not an appropriate ground for reducing Thurston's sentence.

As demonstrated, the reasons provided do not support Thurston's receiving a sentence 95% below the guideline recommendation. Typically this conclusion would end the discussion, and we would remand for resentencing. *See Smith*, 445 F.3d at 7. But this case is atypical. Some of the conduct underlying Thurston's conviction is almost two decades old, and Thurston's sentence now has been vacated twice. We are concerned that vacating Thurston's sentence without providing further guidance might lead to another contentious district court proceeding and a third appeal. This would benefit no one.

Two district judges have concluded that a sentence below the guideline recommendation is warranted in this case. While we think that there are plausible reasons to support a below guideline sentence, these reasons do not permit the extreme variance that has been granted.

One ground supporting a below-guideline sentence could be that the intended loss attributed to Thurston overvalued the seriousness of his offense. This was a basis for a downward departure under the guidelines, *see United States v. Ravelo,* 370 F.3d 266, 275 (2d Cir. 2004), and remains relevant post-*Booker, see United States v. McBride,* 434 F.3d 470, 477 (6th Cir. 2006).

The trial judge found that Thurston intended a loss of over $5,000,000. "Much of Thurston's guideline sentence range . . . was driven" by this determination. *Thurston I,* 358 F.3d at 68. We concluded in *Thurston I* that the intended loss finding was sustainable, but believed that the issue presented a somewhat close question. *Id.* at 69. Unconstrained by the mandatory guideline regime, a sentencing court plausibly could conclude that a $5,000,0000 intended loss finding, with its resultant 14-level increase in the offense level, leads to a modest overstatement of the seriousness of Thurston's crime.

Another possible reason for a below-guideline sentence is Thurston's documented record of good works. This was one of the bases on which Thurston received a downward departure in his first sentencing. We vacated that departure because a good works departure was impermissible unless the good works were "exceptional." *Thurston I,* 358 F.3d at 79. While we concluded that Thurston's endeavors were not "exceptional," we did acknowledge that "[s]ave for his crime, Thurston . . . lived a creditworthy life." *Thurston I,* 358 F.3d at 79. Post-*Booker,* a sentencing judge "could well conclude that a . . . discouraged factor[] did not quite justify a departure from the guidelines . . . but might justify a somewhat shorter sentence under a reasonableness standard." *United States v. Bradley,* 426 F.3d 54, 55-56 (1st Cir. 2005). Under this more flexible

approach, Thurston's good works could justify a somewhat shorter sentence.

Isola's probationary sentence also could justify a somewhat reduced sentence. While Isola and Thurston were not similarly situated, we acknowledge the district court's concern that *too* wide a divergence between the sentence imposed on Isola and Thurston could negatively affect the public's "respect for the law." In administering the criminal justice system, it is important to "preserve the appearance of justice." *Cullen v. United States*, 194 F.3d 401, 408 (2d Cir. 1999). A sentencing court could plausibly conclude that extremely divergent sentences would undermine the accepted notion that similar conduct should be punished in a somewhat similar manner. *Cf. Lazenby*, 439 F.3d at 934 (recognizing that extreme disparities in the sentences imposed on coconspirators could "fail[] to promote respect for the law").

Balanced against these grounds for leniency are reasons for imposing a stiff penalty. Thurston committed a serious offense warranting substantial punishment. Medicare "fraud is a serious crime . . . [which] affects the financial integrity of [a] program[] meant to aid tens of millions of people in need of health care. Every dollar lost to fraud is a dollar that could have provided medical care to the elderly or the disabled." *Thurston I*, 358 F.3d at 81. Moreover, the recommended guidelines sentence is 60 months and, for the reasons articulated above, this variable remains an "important consideration" in identifying a reasonable sentence. *Jimenez-Beltre*, 440 F.3d at 518; *supra* at 9-10.

An appellate court is not well-suited to determine *the* appropriate sentence for a defendant. *See Smith*, 445 F.3d

at 7 ("Framing a . . . sentence is, in the first instance, the responsibility of the district judge"). But post-*Booker,* appellate courts are tasked with drawing the line separating reasonable from unreasonable sentences. *See Booker,* 543 U.S. at 263, 125 S.Ct. 738 (stating that "appellate judges will prove capable" of applying the "reasonableness" standard under advisory guidelines). Having reviewed the record, the recommended guideline sentence, and the § 3553(a) factors, we conclude that a sentence of fewer than 36 months' imprisonment would fail reasonableness review in the present circumstances. *See United States v. Moreland,* 437 F.3d 424, 437 (4th Cir. 2006) (vacating sentence imposed as unreasonable under *Booker* and remanding with instructions setting a floor for resentencing).

In setting the minimum sentence that could withstand reasonableness review, we are not endorsing 36 months as the correct sentence for Thurston. Indeed, given the seriousness of Thurston's offense and his role as an organizer and lead implementer of the fraud, this court would be inclined to impose a sentence at or near the guideline recommendation if it were acting as the sentencing court. But our role here is only to determine the minimum sentence that could be considered reasonable on the present record. Accordingly, we emphasize that in remanding for resentencing, we are not ordering that a 36-month sentence be imposed. The district court is free to solicit further argument and evidence from the parties, but, absent an extraordinary development, the court must impose a sentence of no less than 36-months' imprisonment.

Vacated* and *remanded.

United States Court of Appeals
For the First Circuit

No. 05-2271

UNITED STATES

Appellant

v.

WILLIAM THURSTON

Defendant-Appellee.

Before:

Boudin, *Chief Judge*,
Lynch and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: August 15, 2006

Appellee's motion to stay mandate is allowed, conditioned on the filing of a petition for writ of certiorari within 30 days.

By the Court:

By: RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.

[cc: Susan G. Winkler, AUSA, Michael K. Loucks, AUSA, Michael J. Sullivan, USA, Dina Michael Chaitowitz, AUSA, Joseph P. Russoniello, Matthew D. Brown, Daniel J. Popeo, Esq., Paul D. Kamenar, Esq., Judith H. Mizner, AFPD, Miriam Conrad, AFPD]

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA v. **WILLIAM THURSTON**	**AMENDED JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) **Case Number:** **1: 98 CR 10026-003-MLW**
Date of Original Judgment: 6/26/2002	Joseph Russoniello, Esq. Defendant's Attorney

☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.36)

THE DEFENDANT:

☐ pleaded guilty to count(s): _____

☐ pleaded nolo contendere to counts(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Defraud United States	08/30/93	1

☐ See continuation page

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on counts(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any charge of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
XXX-XX-7878

Defendant's Date of Birth:
XX/XX/1945

Defendant's USM No.: 21941-038

Defendant's Residence Address:
10065 S. Memory Book Way
S. Jordan, UT 84095

Defendant's Mailing Address:
Same

06/16/05
Date of Imposition of Judgment

/s/ Mark L. Wolf
Signature of Judicial Officer

The Honorable Mark L. Wolf
Name and Title of Judicial Officer

Judge, U.S. District Court

Date

June 30, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of time served

(3 months)

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before _____ on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of time served (24 months) first 3 months in home confinement.

The defendant is prohibited from possessing a firearm or other dangerous weapon.

☐ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 25,000.00	

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

☐ See Continuation Page

TOTALS	$0.00	$0.00	

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☒ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☒ Special instructions regarding the payment of criminal monetary penalties:

The fine shall be paid within 45 days of the imposition of sentence or by August 1, 2005.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number, Defendant Name, and Joint and Several Amount:

☐ See Continuation Page

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
v.	(For Offenses Committed On or After November 1, 1987)
WILLIAM THURSTON	**Case Number: 1: 98 CR 10026-003-MLW**
Date of Original Judgment: 6/26/2002	Joseph Russoniello, Esq. Defendant's Attorney

☐

THE DEFENDANT:

☒ pleaded guilty to count(s): 1
☐ pleaded nolo contendere to counts(s)_____ which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Defraud United States	08/30/93	1

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The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on counts(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: XXX-XX-7878

Defendant's Date of Birth: XX/XX/1945

Defendant's USM No.: 21941-038

Defendant's Residence Address: 10065 S. Memory Book Way S. Jordan, UT 84095

Defendant's Mailing Address: Same

06/16/05
Date of Imposition of Judgment

/s/ Mark L. Wolf
Signature of Judicial Officer

The Honorable Mark L. Wolf
Name and Title of Judicial Officer

Judge, U.S. District Court

Date

June 17, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of time served

(3 months)

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before _____ on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of time served (24 months) first 3 months in home confinement.

The defendant is prohibited from possessing a firearm or other dangerous weapon.

☐ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

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The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

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The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

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4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 25,000.00	

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

☐ See Continuation Page

TOTALS	$0.00	$0.00	

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☒ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☒ Special instructions regarding the payment of criminal monetary penalties:

The fine shall be paid within 45 days of the imposition of sentence or by August 1, 2005.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

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Case Number, Defendant Name, and Joint and Several Amount:

☐ See Continuation Page

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES
OF AMERICA

V. CRIMINAL NO. ___

William Thurston
Defendant

MEMORANDUM OF SENTENCING HEARING
AND
REPORT OF STATEMENT OF REASONS

Wolf D.J.

Counsel and the defendant were present for sentencing hearing on 6/16/05. The matters set forth were reviewed and considered. The reasons for sentence pursuant to Title 18 U.S.C. 3553(c), as set forth herein, were stated in open court.

1. Was the presentence investigation report (PSI) reviewed by counsel and defendant including any additional materials received concerning sentencing? [At initial sentencing] ✓ Yes ___ No

2.(a) Was information withheld pursuant to FRCrP 32(c)(3)(A)? ___ Yes ___ No

(b) If yes to (a), has summary been provided by the court pursuant to FRCrP 32(c)(3)(B)? ___ Yes ___ No

3.(a) Were all factual statements contained in the PSI adopted without objection? ___ Yes ✓ No

(b) If no to (a) the PSI was adopted in part with the exception of the following factual issues in dispute: [This was a remand for sentencing and this court, which did not conduct the initial sentencing decided only the remanded issues.]

(c) Disputed issues have been resolved as follows after ___ evidentiary hearing, ___ further submissions and/or ___ arguments:

4.(a) Are any legal issues in dispute? ___ Yes ___ No

If yes, describe disputed issues and their resolution:

5.(a) Is there any dispute as to guideline applications (such as offense level, criminal history category, fine or restitution) as stated in PSI? ___ Yes ___ No

If yes, describe disputed issues and their resolution:

(b) Tentative findings as to applicable guidelines are:

Total Offense Level: 26
Criminal History Category: I
63 to 78 months imprisonment
24 to 36 months supervised release

$12,500 to $11,600, 760 fine (plus $___ cost of imprisonment/supervision)
$ – restitution
$100 special assessment ($_____ on each of counts)

6.(a) Are there any legal objections to tentative findings? ___ Yes ___ No

(b) If no, findings are adopted by the Court.

(c) If yes, describe objections and how they were addressed:

OR sentence hearing is continued to _____ to allow for preparation of oral argument or filing of written submissions by _____.

7.(a) Remarks by counsel for defendant.[1] ✓ Yes ___ No

(b) Defendant speaks on own behalf. ✓ Yes ___ No

(c) Remarks by counsel for government. ✓ Yes ___ No

8.(a) The sentence will be imposed in accordance with the prescribed forms in the Bench Book Sec. 5.02 as follows:

[1] The order of argument and/or recommendations and allocution may be altered to accord with the Court's practice.

___3___ months imprisonment

_____ months/intermittent community confinement

_____ months probation

___24___ months supervised release [first 3 in home confinement]

$ 25,000 fine (including cost of imprisonment/supervision) [to be paid in 45 day]

$ ___–___ restitution

$ ___100___ special assessment ($ _____ on each of counts _____)

Other provisions of sentence: (community service, forfeiture, etc.)

(b)✓ After imposing sentence, the Court has advised the defendant of the defendant's right to appeal within 10 days of the entry of judgment in accordance with FRCrP 32(a)(2).

9. Statement of reasons for imposing sentence. Check appropriate space.

(a)_ Sentence is within the guideline range and that range does not exceed 24 months and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR_ Sentence is within the guideline range and that range exceeds 24 months and the reasons for imposing the selected sentence are:

(b)_ Sentence departs from the guideline as a result of

_ substantial cooperation upon motion of the government

OR

_ a finding that the following (aggravating or mitigating) circumstance exists that is of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that this circumstance should result in a sentence different from that described by the guidelines for the following reasons:

[As described in detail in court, the sentence is a variance from the Guidelines (a non-Guideline sentence) based on the §3553(a) factors, including particularly the need to avoid unwarranted disparity with a co-defendant and the need to promote respect for the law.]

(c)_ Is restitution applicable in this case? ___ Yes ✓ No

Is full restitution imposed? ___ Yes ___ No

If no, less than full restitution is imposed for the following reasons:

(d)_ Is a fine applicable in this case? ✓ Yes ___ No

Is the fine within the guidelines imposed? ✓ Yes ___ No

If no, the fine is not within guidelines or no fine is imposed for the following reasons:

___ Defendant is not able, and even with the use of a reasonable installment schedule is not likely to become able, to pay all or part of the required fine; or

___ Imposition of a fine would unduly burden the defendant's dependents; or

___ Other reasons as follows:

10. Was the plea agreement submitted in this case? ___ Yes ✓ No

Check appropriate space:

___ The Court has accepted a Rule 11(e)(1)(A) charge agreement because it is satisfied that the agreement adequately reflects seriousness of the actual offense behavior and accepting the plea agreement will not undermine the statutory purposes of sentencing.

___ The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11(e)(1)(C) sentence agreement that is within the applicable guideline range.

___ The Court has accepted either a Rule 11(e)(1)(B) sentence recommendation or a Rule 11(e)(1)(C) sentence agreement that departs from the applicable guideline range because the Court is satisfied that such a departure is authorized by 18 U.S.C. 3553(b).

11. Suggestions for guideline revisions resulting from this case are submitted by an attachment to this report. ___ Yes ___ No

12. The PSI is adopted as part of the record, either in whole or in part as discussed above and is to be maintained by the U.S. Probation Department under seal unless required for appeal.

13. Judgment will be prepared by the clerk in accordance with above.

14. The clerk will provide this Memorandum of Sentencing Hearing And Report of Statement of Reasons to the U.S. Probation Department for forwarding to the Sentencing Commission, and if the above sentence includes a term of imprisonment, to the Bureau of Prisons.

June 16, 2005
DATE

/s/ Mark L. Wolf
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	CR 98-10026
	)	Boston, MA
v.	)	June 15, 2005
WILLIAM THURSTON	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE
SENTENCING HEARING

APPEARANCES:

United States Attorney
by SUSAN WINKLER & JAMES ARNOLD, AUSAs
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Cooley Godward
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JUDITH A. TWOMEY, RPR
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Boston, MA 02210
(617) 946-2577

[2] THE CLERK: This is Criminal Matter Number 98-10026, United States versus William Thurston.

Court is in session. You may be seated.

THE COURT: Good morning. Would counsel please identify themselves for the court and for the record.

MS. WINKLER: Susan Winkler and –

MR. ARNOLD: Jim Arnold for the United States.

MR. RUSSONIELLO: Good morning, your Honor. Joseph Russniello [sic] with Matthew Brown from Cooley Godward for the defendant, Mr. Thurston, who is present.

THE COURT: Thank you. I apologize for the delay in starting. I've been working intensively on this since I completed a trial on Monday, and I thought that it might help if I organized my thoughts, told you what I think are the issues properly before me, and what at the moment I view as the most important of them. And then I think it will help you decide what to argue.

I've put aside today for this, and we'll see where we are at the end of the day.

But we're here pursuant to the First Circuit's April 19, 2005 remand, and the remand specifically refers to Booker. This case was not complete on appeal when Booker was decided and, therefore, it's been remanded so the sentence can be reconsidered in light of Booker. And as I understand it, Judge Harrington – I have to [3] reconsider the sentence, which I understand was originally six months, but then that was reversed.

In light of the Section 3553(a) factors. And we can discuss what Booker means but, essentially, the Guidelines are advisory and should, if possible, calculate the Guideline range, but I have to consider the Section 3553(a) factors and tailor the sentence that's most reasonable and appropriate.

I was specifically directed to decide the issue that Judge Harrington didn't decide at the original sentencing, that is, whether there should be a two level adjustment or [sic]

obstruction of justice, and I believe I've been directed to impose a fine. I'm told that Booker doesn't affect the fine. And the First Circuit, noting that this matter has been pending for about five years and it was reassigned to me from Judge Harrington, asked me to deal with it promptly.

So, once mandate issued, I issued my May 16 order and, in response to that, I've received briefs from each side and reply briefs from each side and voluminous appendices and the trial transcripts.

And then I issued another order yesterday bringing to the parties' attention the First Circuit's decision on June 9 in the Wilkerson case, which I thought had some arguable relevance to the proceedings today.

[4] As I read the submissions, I see that the defendant wants to reopen many issues that seem to me to have been decided earlier. Probably the paradigm includes the amount of the intended loss, which I think Judge Harrington found to be in excess of $5 million.

Neither side referred to the First Circuit cases on the mandate rule, which is a variation of the law of the case rule. But, generally speaking, in the First Circuit, at least, a remand doesn't open the entire case automatically. The case is sent back for specific limited purposes. However, a court may reopen a decided issue in very special circumstances. What you need is a change in the law, which is what prompted the Booker remand, significant new evidence, or a blatant error in a prior decision, as the First Circuit has written a number of times, including in United States versus Bell, 988 F 2nd 247 at 251.

The defendant argues that after Booker, sentencing enhancements have to be proven beyond a reasonable

doubt. If this were true, I think it would justify a reopening of issues like intended loss, because it's conceivable that the evidence would have been sufficient before Judge Harrington to prove $5 million by a preponderance, but not beyond a reasonable doubt.

But my present sense is, though, that that's not [5] correct. I think the First Circuit has since Booker indicated that under the current advisory Guideline regime, proof by a preponderance of the evidence remains the standard for enhancements, for proving enhancements, and it's permissible to prove them to a judge, nct to a jury.

I have in mind particularly Gonzales Mercado, 402 F 3rd 294 at 302 to 3; and Antonakopoulos, 399 F 3rd at 75.

I also tentatively believe that in deciding enhancements – the court in deciding enhancements rather than a jury deciding them does not violate the defendant's right to due process, as the Eleventh Circuit said in Duncan, 400 F 3rd 1279 at 1307, and as the District Court in the Southern District of West Virginia found in Gray, 362 F Supp 2nd 714 at 726.

So my present but still tentative view is that I should be addressing in this sentencing only the obstruction of justice issue and the implication of the Section 3553 factors.

And, essentially, I think I have to calculate the Guideline range and then decide whether the section 3553(a) factors justify what would be a non-Guideline sentence. If I were to give a sentence less than 60 months, I think it would be a non-Guideline sentence [6] based on the findings that have already been made. But if I were going to

depart or vary from the Guidelines, I would have to know what the – I would first have to calculate the proper Guideline range, if I could. As I wrote in Ferrara, there are some cases where it's not necessary or appropriate to do that.

I believe that the First Circuit has already decided that the defendant's admitted good works were not sufficient to justify a downward departure. However, after Booker, I can now take those good works into account as part of the defendant's history and as relevant to any arguable need to protect society from any danger he might present.

So the good works are properly part of the argument, but not in an effort to persuade me to depart and give a Guideline sentence based on good works, but to vary from the Guidelines, give a non-Guideline sentence.

As I discussed somewhat in the Ferrara decision that you each cited and, as I've said, I think under Booker it's my obligation to calculate the Guidelines, if possible, and then tailor a sentence in view of the Section 3553(a) factors to impose a sentence that is reasonable and most appropriate in all the circumstances.

And one of the things that I can consider, one of the major effects of Booker for the purposes of this [7] case is that in contrast to the mandatory Guideline regime, I can consider a disparity between codefendants. That was prohibited by cases like Wogan prior to Booker. But as I wrote in Ferrara, I think, the First Circuit in Schneiderhan didn't exclude that as a matter of law after Booker as a cognizable consideration. There are cases like Hensley and Revcock and that Wilkerson decision I just brought to your attention, while not focusing on codefendants, emphasizes

that one of the effects of Booker is you can consider disparity, unwarranted disparity.

I understand, as the government argues, that an important purpose of Section 3553(a) and the Guidelines is to diminish unwarranted disparity nationwide. But Section 3553(A)(2), among other things, emphasizes that a sentence must promote respect for the law. And Judge Harrington characterized the codefendant Isola as the prime architect of the scheme and as more culpable than Mr. Thurston.

Pursuant to his plea agreement with the government, as I understand it, Mr. Isola got a probationary sentence. And I'm just trying to be as transparent as possible. I don't know where any of this is going to come out. But, to me, I'm concerned that giving the prime architect of the scheme a sentence of [8] probation and giving Mr. Thurston a 60-month sentence after he rejected a similar deal and exercised his right to a trial would injure respect for the law unless the disparity was warranted by some cognizable – some legitimate consideration.

Now, the government argues that Mr. Isola's plea was pursuant to a charge bargain, not a fact bargain. And as I understand it, he was originally indicted for a conspiracy regarding the Ferritin test and the Apol test, A-P-O-L, abbreviation of something unpronounceable. But, basically, under the Guidelines, if you look at section – well, if you look at part B, plea agreement – and we're under the November 1992 Guidelines, I believe – when the government gives a judge a plea agreement, it's implicitly represented that the sentence recommended or provided in the plea agreement promotes the statutory purposes of Section 3553(a) and would not perpetuate unwarranted disparity.

You can go to page 341 in the introductory comment. And if you go over to Section 6B1.2 on the next page, the government in tendering Isola's plea agreement implicitly represented that under section – that the plea agreement – but, particularly, the remaining charges adequately represented the seriousness of Isola's actual offense. Behavior, including relevant conduct.

[9] I assume that if Isola was originally charged with Ferritin as well as Apol as an object of the conspiracy and the government felt it had enough evidence to go to trial on Ferritin with regard to Mr. Thurston and, indeed, survived Rule 29 on Ferritin but not Apol, it could have proved by a preponderance of the evidence that Ferritin was relevant conduct with regard to Isola. And you're representing in a plea agreement, again, under 6B1.2 because you're asking the judge to accept it, that plea agreement would not undermine the statutory purposes of sentencing or the Sentencing Guidelines.

So, in my mind, it's important for me to be educated on whether there really is legitimate difference between Mr. Isola and Mr. Thurston and, if so, how a disparate sentence would be reasonably justified based on that difference.

At the moment, I don't think merely going to trial can be a proper consideration. It's not unconstitutional to, you know, offer a much better deal to somebody on a plea than at trial. But it would be problematic to punish somebody for going to trial.

Acceptance of responsibility may be a difference between Mr. Isola and Mr. Thurston, although Mr. Isola, as I understand it, entered a nolo plea. He didn't even plead guilty. And I'll be interested in being educated [10] to

understand better whether he had any agreement to cooperate and whether he was called by the government or the defendant at trial. But the First Circuit seemed to think he was cooperating with the government, but I didn't understand that to be part of his plea agreement.

And in my present conception, perjury could be quite a material difference between the two of them. A person has a right to go to trial and just sit there. Doesn't have to testify at all. But you don't have a right to go to trial and commit perjury, which injures the integrity of the judicial process.

So, in my current conception, this charge or these charges that Mr. Thurston committed perjury at his trial are not just important to how I would calculate the Guideline range, but also very important to the impact of the Section 3553 factors, including, I think it's (a)(6), disparity.

The government in its original brief identified three areas of alleged perjury. It alleges that Mr. Thurston falsely denied directing his laboratories to add Ferritin tests to Lab Scan. The government contends that Mr. Thurston falsely denied knowing that Ferritin tests – the Ferritin tests would be provided free to doctors' non-Medicare patients and charged to their Medicare patients. Third, it's alleged that Mr. Thurston perjured [11] himself when he denied knowing that doctors were not being provided a before the fact choice not get Lab Scan without Ferritin. I think I've stated that right.

But what I don't feel I have yet from the government, what the defendant contends I don't have, is an identification of the specific statements that are purportedly perjurious. And I'm not saying we can't discuss some of these preliminary issues like how many issues I need to discuss,

but what's of primary concern to me at the moment is what's the government's strongest case for perjury? You know, show me your best. But I'm going to want you to show me specifically where in all these records are the purportedly – is the purportedly perjurious statement, because I have to consider it with specificity. I want the government to point me to the evidence that was in the record before Judge Harrington before he abdicated his responsibility for this case that the government relies on to prove that the statement is perjurious. And then I want the defendant to respond with specificity.

Under Dunnigan and the First Circuit cases that it's generated, with regard to each particular allegedly perjurious statement, I'm going to have to decide is it false? Is it material? So you'll have to argue the materiality. And if it's false and material, was it made [12] willfully and, essentially, intentionally and not as a result of mistake or faulty memory because Mr. Thurston was testifying to events that had occurred ten or more years before.

I believe that I have to decide whether perjury has been proven by a preponderance of the evidence, and I just want to put this out there. You didn't address this in your papers. But the obstruction provision of the Guidelines is 3C1.1. It was amended in 1997. And we're under the 1992 version of the manual. So I have to apply, I believe, a standard that I should have applied if we were doing this in 1993, at some point before the 1997 version.

There are a couple of cases where without any discussion the First Circuit said that obstruction has to be proven or perjury has to be proven by a preponderance of the evidence. They include Thomas, 86 F 3rd 263, and Amylek, 926 F 2nd 64 at 67.

But prior to 1967 there were also circuits like the Third and the DC Circuit that interpreted the application note saying that alleged false testimony should be evaluated in the light most favorable to the defendant to require proof of perjury by clear and convincing evidence. There are cases like Fiorelli (sic), 133 F 3rd 218 at 222 and note 3, and Arnold, 106 F [13] 3rd 37, 1997. Both of those are Third Circuit cases. And Montague, 40 F 3rd 1251, a 1994 DC Circuit case.

In 1997, the provision, as I understand it, was revised to establish the preponderance of the evidence standard as the correct standard. The Third Circuit treated that as a substantive amendment, not retroactive. The Ninth Circuit in Ventoro, 182 F 3rd 930, note 4, treated it as a clarification so it could be applied retroactively. But I throw it out there because I like to know what standard I'm applying. And I think it's always been in the First Circuit the preponderance standard. If somebody has a different view, we can discuss it.

At some point, and this shouldn't get completely lost in technicality, but after I calculate the Guidelines, I'm going to give Mr. Thurston an opportunity, if he wants to take advantage of it, to speak. This is fundamentally about him, although one could easily be concerned that that seems to have been lost.

And then right at the end, of the government's reply brief is an issue that I haven't encountered before, and that's the issue, do I or the Bureau of Prisons decide the credit Mr. Thurston would get for the sentence he's already served. As I glanced at Martin and [14] Carpenter, the First Circuit seems to be saying me. And the First Circuit – but in those cases they got probation, and some

of that was on home confinement. The First Circuit seems to be saying, but I haven't read the cases closely, the defendant probably shouldn't get one day credit for each day of home confinement. And I was surprised to see that because the Guidelines where they permit home confinement as part of a sentence of incarceration permit it to be substituted for prison on a day for day basis. So I thought, essentially, the Sentencing Commission had made that decision that a day in home confinement was the equivalent of a day in a halfway house or a day in an appropriate probably low level prison.

So, you know, essentially, that's where I am. As I told you, I cancelled the rest of my schedule for today. We can go for as much of the day as necessary. If I'm in a position to decide these matters today, I will. If I think I'll be in a position to decide these matters tomorrow morning, I will. And if there's something that looks like it's going to take me longer than that, the hearing will have to be continued.

I don't know if you would like me to take a five-minute break or something so you can think about all of that or, you know, whether you feel you each know, [15] maybe particularly the defendant, immediately how you would like to proceed. Because, generally speaking, I'm not planning to go through the presentence report, and I didn't – from what I can tell, looking at the presentence report and the sentencing transcript, there were a number of objections that Judge Harrington never ruled on. But I don't think they're within the scope of the mandate.

MR. RUSSONIELLO: It would be helpful to us if we did have five minutes. We have allocated between ourselves some of these items, but just to be sure that we're on the same track.

THE COURT: That's fine. And if it turns out you want more than five, tell Mr. O'Leary. I'll give you whatever is reasonable.

MR. RUSSONIELLO: I think 11:30 should be fine.

THE COURT: We can say that, come back at 11:30 and, as I said, you're not foreclosed by what I've just said from arguing that it's got to be proof beyond a reasonable doubt. On the other hand, I think I've got some guidance from the First Circuit. And now that you know as transparently as I can tell you what my state of mind is, you know, decide what you want to emphasize. Because while I'm not saying that I won't listen to you on any of the many issues you raised, the thing that [16] interests me the most at this point is that obstruction business. And I'm not saying that if I – if the perjury isn't proven, that means I've decided Mr. Thurston should get the same sentence as Mr. Isola. I don't know where all this is going to come out. But at the moment, that's right at the heart of what's important to me. Okay?

MR. RUSSONIELLO: Thank you.

THE COURT: Court is in recess for ten minutes.

(Short break.)

THE CLERK: Court is back in session. You may be seated.

THE COURT: How would the parties propose to proceed in the circumstances?

MR. RUSSONIELLO: Your Honor, it might make sense for the defense to address this consequence of

the post-Booker or the Booker ruling, basically, on the remand and the court's first grouping of ideas here, and Mr. Brown will address that in terms of what we believe is the expansiveness of this court's entitlement to review the enhancements and what standard of burden of proof is required and what methodology for examining those enhancements should be.

THE COURT: Okay.

MR. BROWN: Good morning. Matt Brown for Bill Thurston.

[17] If I might, I would just start, perhaps, with the due process argument and then proceed to the standard of proof from there.

THE COURT: Why don't you pull that microphone a little closer to you, though.

MR. BROWN: Just at the back end of a cold. I'll try to speak up.

The essence of the due process argument is not only whether the judge or the jury has the function of finding facts post-Booker but is, rather, whether the remedy majority opinion of Booker can be applied to Thurston in this instance or whether that would violate fair warning, given that the remedy majority opinion was such a novel, frankly, construction of the Sentencing Reform Act.

We know from Griffith V Kentucky and from Marks and from Bowie (sic) and Rogers that the defendant gets the benefit of a new constitutional rule, and that applies retroactively if the case is still in direct review. But to the extent that a decision –

THE COURT: What is the new constitutional rule?

MR. BROWN: That is the right[s] majority opinion of Booker, which held that the Sixth Amendment had violated [sic] unless the sentencing enhancing facts are found by a jury beyond a reasonable doubt.

[18] THE COURT: Under – I understand Booker to also say that's under a mandatory system, but what you would call the remedy majority, Justice Breyer essentially rewrote the statute and said that the remedy is they're advisory and, in those circumstances, what's the due process problem with a judge finding the facts?

MR. BROWN: I mean, that's exactly right. There are these two opinions. Only one of them is a constitutional opinion. The other one is a statutory construction and, as you put it, almost a quasi legislative opinion. So the question here is whether that quasi legislative rewriting of the Sentencing Reform Act can be applied in this case or whether that violates due process principles ex post arguments –

THE COURT: Well, due process principles, as I understand them, usually require notice and an opportunity to be heard. And when Mr. Thurston is sentenced, he had notice that the judge was going to decide the enhancements based on a preponderance of the information standard. So where's the due process problem?

MR. BROWN: I think that's one of the trickiest things about this argument is because you have Booker that comes in 2005, right, and we're talking about conduct that occurred in '87 to '93. And so one might [19] say, and the government has said, well, look, Thurston was on

notice that his sentence could be five years under 18 USC 371, so what is he complaining about now? But the problem with that argument is that the Supreme Court has held in Griffith V Kentucky and other cases that you get the retroactive benefit of a new constitutional rule. So the right way to look at this is not to look at the fact that in 1987 the 371 provide [sic] for five years or not; what you look at is that he had the right to be sentenced under a mandatory Guidelines regime that was based only on facts found by a jury. You can't say, well, he's on notice of a sentencing regime that doesn't comply with the Sixth Amendment. You're on notice that your Sixth Amendment rights are violated.

THE COURT: Let me try to think this through because I haven't studied this as deeply as I would have liked to.

(Short pause.)

THE COURT: If – I'm not sure this argument with me at least at the moment would get you where you want to go, and then you'd end up with issue preclusion principles too.

Let's say – this controversy doesn't affect his conviction. None of that should be lost in this. He's convicted.

[20] MR. BROWN: Right.

THE COURT: Previously, the United States and Mr. Thurston through his counsel had an opportunity before Judge Harrington to argue about intended loss. I think the issues in the presentence report said there was notice. Judge Harrington decided by a preponderance of the evidence the intended loss was over five million.

Under your argument it would be the jury should have decided that, so it wasn't properly decided back in 1991. It should be reopened now. And I guess you want to argue I should find it beyond a reasonable doubt – I mean, I should make the determination beyond a reasonable doubt. But if it got reopened now and there was a preponderance of the evidence standard, why wouldn't I be precluded by the fact that the same issue under the same standard was litigated before a United States District Judge and appealed and not reversed on appeal?

MR. BROWN: That's because we know from the Booker right majority opinion that what happened at the initial sentencing was not a Sixth Amendment compliant regime. So you can't say that the defendant was on notice by virtue of what happened the first time around. What he has the right to under the right majority decision of Booker is to have his sentence based on facts that were found by the jury. That's the extent of the [21] Sixth Amendment holding in Booker.

So what I'm saying is that now on remand he gets the benefit of the right majority opinion in Booker, but you can't apply the remedy majority opinion because it was an unforeseen judicial expansion, frankly, of the statute. Before the remedy opinion, his sentence would be capped at level 6 because that's all that's supported by the jury verdict in this case. After the remedy opinion, there's virtually no ceiling, potentially, under 3553A all the way up to the five years that's provided for by the offense of conviction, 371.

So my point is that applying the remedy opinion and this sort of expansive and novel construction of the statute, that is the essence of the due process violation.

THE COURT: And how does your argument reconcile with the First Circuit's holdings in Gonzales Machado and Antonakopoulos.

MR. BROWN: I have to confess, I'm not sure I've read Gonzales Machado.

THE COURT: It mainly quotes – it's an April 1, 2005 decision, and I think it doesn't really go beyond the first – hold on just a second.

(Short pause.)

THE COURT: It says: There is a Booker error, [22] although there's not any of the alleged errors that the appellant identifies. Booker teaches that the imposition of sentencing enhancements under a mandatory regime is erroneous. Thus, a Booker error has occurred when a sentencing court has treated the Guidelines as mandatory rather than advisory. As we said in Antonakopoulos, Booker error is that the defendant's Guideline sentence was imposed under a mandatory system. The error is not that a judge by a preponderance of the evidence determined facts under the Guideline which increased the sentence beyond that authorized by the jury verdict or an admission by the defendant. The error is only that the judge did so in the mandatory sentence.

(Short pause.)

THE COURT: But they do go on to say that it was a plain error.

MR. BROWN: Well, putting aside the standard of proof for a moment, I actually think the First Circuit misdefined the nature of the Booker error in Antonakopoulos. We frankly made that argument to the First Circuit in

the preceding briefing right before remand. I think the First Circuit has erroneously conflated the two opinions.

THE COURT: Let me ask you the following. Now you're in the First Circuit. Did you come here from [23] California or something? Now you're in the First Circuit. I mean, have I misread – putting aside the implication of what the First Circuit wrote and what I just read you, or can what I just read you be reconciled with the position you're advocating?

MR. BROWN: Well, I think it still can. I mean, because the fact remains, I mean, Antonakopoulos was setting up a plain error review standard, and so it was interpreting Booker in that context. Here, we're not talking about plain error. So if you just look at Booker itself, and Justice Breyer in the remedy majority opinion concedes that it's not a constitutional holding, and he distinguishes it from a constitutional holding. See, you almost have to view those two opinions as if they were two separate cases, if you will. So if the right majority – if the Supreme Court had decided that it was going to take two cases to decide these two issues instead of one, there's no doubt that after Booker 1, let's say, that Thurston would get the benefit of that Sixth Amendment holding, no doubt in the Griffith V Kentucky. So the question would just become whether that second decision then gets applied in this case retroactively. And that's where the ex post facto principles comes in. It's not just an opportunity to be heard; it's the principle of whether that judicial quasi [24] legislative interpretation of the statute expands the potential punishment here, which it potentially does.

Now, the court might not to need to reach that issue if by exercising this authority under 3553A and sentencing under an advisory regime wouldn't bring it above level 6.

THE COURT: Is the argument you're making to me now the one that the Eleventh Circuit rejected in Duncan?

MR. BROWN: It is.

THE COURT: And the Eleventh Circuit's reasoning, I think, was that as long as the maximum possible punishment was not increased, there was no due process violation, looking at things like Apprendi – leave out what they were looking at.

MR. BROWN: No, this issue was addressed in Duncan. I think that case was wrongly decided. And what they basically say is that if you look at the statute that defines the offense of conviction that the defendant was clearly on notice that his punishment could be that great. I think that's exactly wrong. That's not the statutory maximum quote-unquote that you look at. We learned from Blakely and Booker that the statutory maximum quote-unquote for Sixth Amendment purposes is not the maximum under the statute defined in offense of conviction but rather the Guidelines range –

[25] THE COURT: For Sixth Amendment purposes.

MR. BROWN: For Sixth Amendment purposes.

THE COURT: But you're making a Fifth Amendment due process argument.

MR. BROWN: Right, that's right, but the fair notice, for fair notice purposes for due process Fifth Amendment purposes, the statutory maximum that's relevant here is not the statutory maximum under 371 but, rather, the Sixth Amendment statutory maximum under Blakely and Booker.

THE COURT: Due process, you know, notice and opportunity to be heard, go to the fundamental fairness of something, and I haven't thought this all the way through, but we're in an unusual if not unique position. There's nothing that happened except maybe the sentence in 19 – or the conviction in 1991 that was surprising. In other words, there was notice of what the, you know, of what the jury would decide. There was notice of what the judge would decide. There was notice of what standard the judge would employ. And there hasn't been any material change in the law in the First Circuit, at least. Again, today, it's an issue for the judge and to be decided by a preponderance of the evidence. That's why I was saying if you persuaded me that the standard now was beyond a reasonable doubt, then I would think I [26] would have the legitimate discretion to reopen. You also have to be a little careful about what you wish for. If I reopen these things, I'm not bound to find any issue is favorable to Mr. Thurston, as Judge Harrington did, if he found any favorable. But –

MR. BROWN: We've thought that through. I just want to – you keep on saying notice and opportunity to be heard, and I just want to be clear that the due process – principle of due process is obviously the most amorphous sort of constitutional concepts we have. What I'm talking about here are the ex post facto principles that have been found to be inherent in the due process clause.

So it's a little bit different than the cases where there's notice and opportunity to be heard.

THE COURT: But ex post – Booker is not two decisions, it's one decision. And, essentially, it – let me ask you this. Is there any court that's been persuaded by the argument you're making?

MR. BROWN: I don't think so. I think defendants are just starting to make this argument, so it's only been presented to a handful of courts, and then it's obviously percolated up to the Eleventh Circuit in Duncan.

THE COURT: When I said courts, I meant District Courts as well.

[27] MR. BROWN: I'm not aware of any. That doesn't mean it's not the correct argument. Just means –

THE COURT: Ot [sic] doesn't mean I wouldn't be persuaded it was correct either (sic).

But what about, are you arguing that proof has to be beyond a reasonable doubt if this sentence is stayed?

MR. BROWN: Yes, I am. And that, the government seems to point both to the Booker decision itself as well as the Watts case for support of the position that preponderance is sufficient in the circumstances. Well, the Booker case just didn't address this, frankly. It wasn't before the court. And the court only decides issues that are before it. So I don't think that we can look to that case for a dispositive judgment on the issue. We can look for implications from Booker, and I think we should, and Blakely. But, you know, the world has really changed since Blakely and Booker and, in fact, in Justice Stevens['s]

right[s] majority opinion in Booker appeared to go out of his way to really limit the holding in Watts.

THE COURT: What was the holding in Watts?

MR. BROWN: Watts dealt with acquitted conduct, and Watts had language in it that said that it was okay to consider acquitted conduct at a preponderance, by a [28] preponderance standard. Justice Stevens went out of his way to limit that holding. And then in a dissenting opinion, Justice Thomas went even further and pointed out that the Booker majority holding now proved the Sentencing Commission's assumption wrong that a preponderance standard did satisfy due process concerns under the Fifth Amendment.

Now, I'm not saying that that's somehow controlling here, but we certainly have one Justice of the Supreme Court taking the view that due process now requires in this new regime, post-Watts regime, that it requires beyond a reasonable doubt.

And I might just –

THE COURT: Hold on a second.

(Short pause.)

THE COURT: Are there cases that you're aware of where judges have found that the beyond a reasonable doubt standard applies after Booker?

MR. BROWN: There are. There's a case in this district by Judge Gertner.

THE COURT: Pimentel.

MR. BROWN: Pimentel, that's right. And there's also a case, I believe, out of the District of Nebraska – I'll have to get the cite for you. It's cited in our briefs.

[29] THE COURT: Thank you.

MR. BROWN: So not only did Judge Gertner find that that was the standard to be applied but, in the Nebraska case, the court took a slightly different tact [sic] and said, look, this is a serious constitutional issue and, as a matter of constitutional avoidance, I'm going to construe the statutes and apply a reasonable doubt standard to avoid the issue. And I think it's important to note that neither Congress nor the Commission has set a standard here, so it's not as though the court is bound. The court has discretion to provide more protection and enhance the reliability of the factual findings and is not precluded from doing that.

THE COURT: I'm not sure that I have complete discretion. In the early days of the Guidelines, in the early 1990s, there were disputes as to whether the preponderance of the evidence standard was appropriate. I think Judge Becaro (sic) decision called Kekamora (sic), where the Third Circuit for a while used the clear and convincing standard, at least for some things. But don't the Sentencing Guidelines address the standard?

MR. BROWN: The Sentencing Guidelines do not. No, the only way in which – I should say they address it, but they don't require it. The Sentencing Commission says in a note that their belief is that preponderance [30] standard would comport with notions of due process. Justice Thomas in his opinion says that that note has got to be wrong now after Booker. So your Honor is not bound by either the Commission or Congress in terms of choosing

the standard here. You have discretion to do this. All due process does is set a floor below which you can go, and so there's really not a problem.

THE COURT: A floor below which you cannot go.

MR. BROWN: I may have misspoken. Thank you.

THE COURT: Well, my understanding is that historically sentencing factors, even before the Guidelines, were decided by judges by a preponderance of the evidence, and the goal of the judicial rewriting of the Guidelines would be mandatory to advisory was to essentially put us back in that posture.

MR. BROWN: You know, and I think if we were looking at sort of pre-Blakely/pre-Booker precedent, then we might not have an argument, and we didn't make this argument at the original sentencing because we were sort of in a different world at that time, and now we're under a sort of greater awareness as to the importance of reliable fact finding in the sentencing process.

THE COURT: Why don't I hear from the government.

MS. WINKLER: Your Honor, one thing –

[31] THE COURT: You need to grab that microphone too.

MS. WINKLER: The one issue that might be of assistance on this burden of proof and preponderance of the evidence, in McMillan versus Pennsylvania, the court

actually described the distinction for the lesser burden of proof at sentencing versus trial.

THE COURT: We're going to get into the question of whether the tail is wagging the dog here, but go ahead.

MS. WINKLER: But just to the argument that beyond a reasonable doubt where innocence is concerned is constitutional guarantee, where in the sentencing side of things, it's a defendant who's already guilty, so it changes the calculus on what due process is deserved. And, here, where the statutory maximum has been set at five years from before 1988, there is no concern that this defendant has suffered any lack of due process that would change the precedential preponderance standard.

THE COURT: And are there any cases other than Duncan and I think I mentioned Gray that support your position?

MS. WINKLER: Those were the only two that we found, your Honor. There is – there are some others with language in them, but it was Duncan and Gray that [32] dealt with it straight out.

And Duncan, actually, when it cites to the Daubert in Florida opinion on the death penalty procedure, we thought that was actually where the law was invalidated, and they raised the ex post facto argument, and it was kind of the extreme case, at least in our view, and the court still said there's no ex post factor [sic] problem because the fact it was on the books shows how serious we treat that kind of crime, which seems relevant to here where the crime itself has been defined as serious.

THE COURT: Okay. Well, I haven't changed my mind yet. It doesn't mean I won't. I may or may not think about this further. But I think at the moment I'm not going to reopen the issues that I understand were decided and are not within the scope of the remand as I read it. I may read these cases and change my mind, read these cases again and change my mind. But in terms of proceeding now, I don't intend to reopen the issue.

But, Mr. Brown why don't you remind me and make clear on the record what you think those issues are.

MR. BROWN: Well, at this higher standard of proof, I mean, those would be the sentence enhancing facts of intended loss, role in the offense, more than minimal planning, which have the effect of increasing the [33] sentence by some 20 levels under the Guidelines and under a preponderance standard. So our argument is simply that those issues need to be proved now beyond a reasonable doubt, and the government's unable to carry that burden.

I might just add one thing in terms of the law of the case. I think you had made mention – this is something slightly different than a sentencing enhancement but, rather, a departure, and you talked about the First Circuit's decision on the good works departure, and I just wanted to point out that that case was decided shortly after the PROTECT Act had decided, and the First Circuit rejected our retroactivity arguments and applied that act to this case, and so it applied or undertook a de novo analysis and, frankly, in our view, viewed it as de novo authority as fairly expansive. And we actually addressed that issue in our sur-petition [sic] before the Supreme Court. Of course, it never was resolved because of Booker.

But I don't think the law of the case precludes this court from revisiting that issue. I think this court has to make that decision in the first instance. And now in the advisory regime, it's going to be reviewed for reasonableness.

THE COURT: Only if – that – I don't know, maybe you like going up and down. I'm prepared to take the good works into account on the 3553A analysis. I [34] think that's probably one of the two most important implications of Booker for this case, as I perceive it at the moment. But I've got this –

MR. BROWN: If I could –

THE COURT: I've got this extensive – the First Circuit seems, by whatever standard, seems to have decided that my general – they told me, decide the obstruction of justice issue, because that wasn't decided previously. And they said, consider the implications of Booker, which I think means consider whether a non-Guideline sentence is appropriate. But I actually think if you talk me into this one and I say this is a departure, I'd probably do it in an alternative way anyway.

MR. BROWN: That's what I was going to say.

THE COURT: Just to finish the thought, I mean, I just think Judge Lynch might look at this and say, couldn't he read what I wrote? Didn't he understand it?

MR. BROWN: No, I wanted to be clear that in terms of law of the case, I didn't think that was precluded. I'm not trying to lead the court to rest its decision on that ground. I know the court has already indicated that it believes that can be considered under 3553A.

THE COURT: Does the government have a different [35] view as to whether the good works can be considered in connection with the 3553A analysis?

MS. WINKLER: No, your Honor, we agree that it can be under that analysis.

THE COURT: I think that's the proper or at least the most appropriate place for it in the current posture of this case.

MR. BROWN: I'm sorry, your Honor, if I may, just one more issue on standard of proof. It's a slightly different issue. We had taken the position that, of course, reasonable doubt was the appropriate standard for all of the enhancements. If the court were to disagree with that, and the court has indicated that it's likely to, there's still the issue about whether there should be an enhanced standard of proof for the obstruction of justice enhancement. So –

THE COURT: Yeah, and that's why I tried to flag that disparity back in '92 between the standards you say in the First Circuit and the DC Circuit or the First Circuit, Third Circuit.

MR. BROWN: And I just have to say we'd prefer to have some time to analyze that and brief it. I'm not prepared right now to discuss the differing standards between the circuits and whether the subsequent amendment was clarifying rather than substantive and so forth.

[36] THE COURT: You're going to get lunch at about one o'clock. I gave you some of the leading cases. Somebody might find some more. But – and I remember this because I dealt with it in my cases, and I used to be the chair of the sentencing subcommittee of the Judicial

Conference Criminal Law Committee from '88 to '93 or something like that.

So I know there are different standards, and there's a lot of difficulty in figuring out what the language we're now back at meant. But whatever it meant, there are a couple of cases where the First Circuit said without analysis – and maybe there are more where they explain their analysis, but my law clerk didn't find them in the short time he had to look after I raised the issue with him this morning – you know, the First Circuit said preponderance, and I think the amendment in '97 was intended to clarify or change the standard so there would be a uniform understanding throughout the circuits, preponderance. But I raised it because it could conceivably make a material difference. It could conceivably be outcome determinative.

MR. BROWN: I just wanted to continue to flag that issue as being somewhat distinct from these other standard of proof issues.

THE COURT: Okay. The library is on the top [37] floor. You can probably find those cases at lunchtime. It looked like Mr. Bachman was helping you out. Maybe he can go get them.

MR. RUSSONIELLO: Well, I think then in the logical sequence or order of things, maybe as the court has outlined them, brings us to the issue of the disparity and the perjurious or alleged perjurious testimony.

THE COURT: I think so, unless there's – well, that would be great. I'd be happy to go to it. At some point you can, if you want, you know, talk about the general Booker standards. But I'd be very pleased to go right to

the perjury because, as you know, that's at the heart of my – purported perjury – that's right at the heart of my thinking.

MR. RUSSONIELLO: And I think we're assuming for purposes of this discussion that the court would consider that the disparity component is now open for legitimate examination because –

THE COURT: Yes.

MR. RUSSONIELLO: – quite frankly, it was under the regimen of a mandatory Sentencing Guideline that precluded disparity, we'll say, in certain contexts, and that is now open.

THE COURT: Well, maybe – that is my state of [38] mind, and that's the series of cases as recent as Wilkerson that I mentioned to you. But it may be useful at this point to deal with that conceptually for me to hear from the government.

As I understand the government's position, but maybe they'll clarify it, particularly if I misunderstand it, they acknowledge that disparity can be taken into account. They argue that I should focus primarily on nationwide disparity. I didn't understand the government to be arguing that I could not take into account disparity between codefendants, particularly if they were similarly situated, but maybe the government should address that.

MR. RUSSONIELLO: If I might, it's page 18, line 22, or roughly line 22 in their opening brief. They acknowledge that disparity between defendants in the same case is now appropriate for consideration. Down at the bottom of the page, your Honor, page 18.

MS. WINKLER: Your Honor, if I could –

THE COURT: Actually, I'm looking at 18. That's contended law.

MS. WINKLER: He's in the wrong – it's a different brief, your Honor.

MR. RUSSONIELLO: It's a requirement.

THE COURT: I'm looking at the first one. Is it [39] in the second one?

MR. BROWN: Yes.

MS. WINKLER: Yes.

THE COURT: Just a minute.

MR. RUSSONIELLO: I'm sorry. I misled the court.

MS. WINKLER: What I was actually doing was citing your opinion, your Honor, where you reached the conclusion in Ferrara that you were not prohibited from considering the disparity between codefendants. And given the First Circuit's guidance in this case where they say before the mandatory Guidelines that it might have had more effect – I'm not quoting it exactly – it does seem to us to be an open issue.

THE COURT: You mean –

MS. WINKLER: As between the codefendants.

THE COURT: You mean something that – when you say open issue, do you mean it is something that can be considered, or do you mean it's uncertain whether it can be considered?

MS. WINKLER: We believe that the national effect, the nationally similarly situated defendants should be given the most weight. But that taking into account the difference between these two defendants is also something that you could look at, given that they [40] were originally charged with the same crime in the same indictment in this court.

THE COURT: And that's what I thought the government's position was, and I believe that's the correct interpretation of law at this point.

MS. WINKLER: Would you like me to address the disparity issue? Would that be –

THE COURT: Sure, you can do it generally, and I've read what you've written. And then, as you know, I want to really get down to a detailed analysis of the purported perjury. But if you want to put that in context, go ahead.

MS. WINKLER: We can do the perjury one first, if you prefer.

THE COURT: Why don't you give me the overview. See if I've got it right.

MS. WINKLER: In connection with the disparity argument, I would think it goes a little bit beyond where your Honor indicated your initial view was on it this morning. And if I may characterize or go back to what the – first, there was no written agreement at all. What happened at the Isola – and what was offered to all four defendants – the government agreed not to contest, not to appeal any sentence that the judge might impose. We understood it was likely that he would impose [41] probation, based on an indication that he gave, but we –

THE COURT: Did you advocate a particular sentence?

MS. WINKLER: We did not. We made no recommendation whatsoever, your Honor, and for the reasons set forth in our brief.

In terms of cooperation, there was none. In fact, and I can cite the record. It's in Isola's testimony on December 4, 2001. It's day 7. In the opening part of his testimony, Mr. Loucks asked him: Mr. Isola, have you and I ever spoken? Answer: No, we have not. And have never even met each other, have we? Answer: No.

He not only didn't meet with us beforehand when requested, but had nothing to do with the government before he was called to the stand. There was no cooperation and no understanding of cooperation.

In connection with the – why it's different –

THE COURT: Who called Mr. Isola, the government or the defendant?

MS. WINKLER: We called Mr. Isola. And Mr. Isola generally testified similarly to Mr. Thurston.

THE COURT: Did he commit perjury?

MS. WINKLER: We did not have the same evidence on Mr. Isola that we had on Mr. Thurston. Our evidence [42] on Mr. Thurston was – we can go through it and, if you want to go through the perjury now, it might be the easiest way to do it. He personally directed the addition the Ferritin to the Lab Scan, that he personally directed, at least in regard to Newbury Park, that there be no choice. And he personally denied deceiving or

tricking doctors or knowing that he was doing that in order to get unnecessary billings to the Medicare program. And for that reason we thought our evidence, because our evidence was strongest on him – I mean, Mr. Isola was the president. He also signed (sic) expenditure requests. But the direct evidence we had of hands on participation, hands on management was to Mr. Thurston, and it was Mr. Thurston who was looking at losing 500 to $800,000 of what they were going to lose due to these Medicare reimbursement reductions.

THE COURT: But Judge Harrington characterized Mr. Isola, if I remember it right, as the prime architect of the scheme, and as the person or as a person more responsible within the conspiracy than Mr. Thurston. Now, he listened to what, three weeks of testimony in the case?

MS. WINKLER: He did, your Honor. I don't know why he said that based on what he heard.

THE COURT: Well, I'm in the position, since I [43] didn't sit there for three weeks to get the opportunity to hear it – I wouldn't have just sat there – you know, that's the judgment that he reached and put on the record. And just as there's certain findings that the defendant would like me to reopen and disturb, I'm not inclined to reopen and disturb that one. I don't know what ultimate impact it will have on my decision-making, but I think in the course of deciding what he had to decide, Judge Harrington reached a judgment on the relative roles of Mr. Isola and Mr. Thurston. I'd be improperly selective as well as not well situated to make a different judgment on their relative roles.

MS. WINKLER: Then, your Honor, I would just ask that in the context of the 3553 factors, I would just note that (a)(6) is only one.

THE COURT: I have that very much in mind.

MS. WINKLER: All right.

THE COURT: And seriousness of the offense is another one.

MS. WINKLER: But with that and where your Honor is, obstruction seems – well, it is a key issue, and perhaps turning to that makes sense.

Let me just – there's one case I would like to bring to your Honor's attention with regard to the 3C1 – in 1992, the standard for obstruction, and it's United [44] States versus Tracy at 36 F 3rd 199.

THE COURT: I have it. Just a second. I have it here. Just a minute. I have it on the bench. I don't have it in my hand here.

I've been here since 6:15 this morning. I may be a little slow.

(Short pause.)

THE COURT: Go ahead.

MS. WINKLER: I would just bring to your Honor's attention, it's at 203 and 204. Page 61 is printed out Westlaw. But it's at page 203 and 204 in the opinion. It references that where you read in light most – in testimony in the favor of the defendant, resolving conflicts that way, it's only dealing with statements made by the defendant where the defendant said something that was vague

or ambiguous. But that that same standard doesn't apply to everything else because, if it did, it would swallow the rule and it would – it could flip a conviction on its head. Because if the defendant denies he was willfully and knowingly engaged in the fraud and you took that in the light most favorable to him, the conviction couldn't stand.

THE COURT: I've prosecuted perjury cases and I've tried perjury cases. I know it's possible to prove a perjury case. But one of the things you need – I [45] think what Tracy stands for is generally the concept that you need a statement that's literally false. If a statement – it says: Words even in context, can be subject to more than one plausible reading.

MS. WINKLER: We agree, your Honor. It does have to be false.

THE COURT: Literally false.

MS. WINKLER: Literally false.

THE COURT: If it's subject to two plausible readings, and one of them is true, then you've failed to prove perjury, right?

MS. WINKLER: Correct. And if it was by faulty memory or mistake or not willful, we would have failed as well.

THE COURT: Exactly. Because of that, I have to really focus on the particular page and several lines so I can do the rigorous analysis that Dunnigan and its progeny required.

MS. WINKLER: This morning we pulled some pages to maybe assist in that in the argument that maybe

I can go through and show your Honor where. And these are in the materials that you have but it's just pulled out to make it a little bit easier.

THE COURT: Okay. Do you have an extra copy I can give my clerk?

[46] MS. WINKLER: I don't.

THE COURT: Maybe you can make one over the lunch.

MS. WINKLER: I will make one at lunch.

THE COURT: Why don't we mark this collection of government's obstruction reference as exhibit 1 of today's date. And then as I told you before, what I want you to do is start with your very strongest case, your proverbial best shot.

MS. WINKLER: I would ask you to turn to tab T1 of exhibit 1 for today's hearing. This is some of Mr. Thurston's testimony on day 11 of the criminal jury trial. And it begins on page 79. This was on direct examination from Mr. Russniello [sic]. Question: At any time between 1988 and 1993, did you either personally or with others contend to deceive doctors in ordering tests that weren't necessary? Answer: No. Question: Or to conspire with others to trick them into ordering tests that weren't necessary? Answer: No. Question: At any time in that period, '88 to '93, did you close your eyes to what doctors might have been doing, either in terms of the background and investigating that tests were medically necessary or close your eyes to the fact that doctors might have been ordering tests that weren't necessary? Answer: No, I did not.

[47] The jury was charged to find exactly that in the crime that they were asked to find whether this defendant did –

THE COURT: Wait a minute. This is useful, but he says, I didn't conspire.

In your brief, you told me that there were three principal points.

MS. WINKLER: Yes, each of these – this is the mens rea, if you will, the willfulness. These are false – in my brief, what we started with and neglected to give you the cites for was that he denied participation in the conspiracy.

THE COURT: And that's – well, no, you gave me three specific areas that – I mean, this is a due process argument. You have to give the defendant before today notice of what you're relying on, and it was in three categories, and they wrote a very helpful brief, and I shouldn't be getting this for the first time today, frankly. But all of this has been going fast, and you all have written very good papers.

MS. WINKLER: Your Honor, I apologize.

THE COURT: No, but here's the point. I mean, here's the point. I mean, I've spent the past two days reading what you wrote. I've gone through parts of those transcripts because they're not in the appendices. You [48] know, just sort of dipping in to test some of this. And, basically, you've got to rely now at sentencing on what you gave them notice of and me notice of before sentencing. And I had come in here thinking that with regard to the three areas you identified in your two briefs, but maybe the first one, that the jury verdict was not necessarily

inconsistent with the statements. For example, one of the three areas you relied on were one of the three areas where the alleged perjury was that Mr. Thurston falsely denied directing his labs to add the Ferritin tests to the Lab Scan.

So my tentative reasoning was he could be convicted of conspiracy even if he didn't direct anybody to it. Maybe the conspiracy started without him and then they said, Bill, let me tell you what we're doing. We're conspiring to trick Medicare by doing the following. We've been doing it for five months. I know this is hypothetical. And he could say, I agree. I'll be part of that conspiracy. I'll make some money at the end of the year. And he might have not engaged in any overt act himself. He would be guilty as a coconspirator, I think, on that analysis, but he wouldn't have testified falsely if he did indeed say, I didn't direct the labs to add Ferritin to Lab Scan. That was my reasoning.

MS. WINKLER: And it may have been, obviously, [49] our fault. The sentence in the brief without the cite in it is that Thurston took the stand and denied under oath key facts regarding his knowing and willful agreement to commit the crime. As described below, it was to blame the crime on his general managers.

What that testimony goes to is the willfulness of Thurston in each of the lies he makes to the jury when he says, my general managers did it. It was a policy of the corporation to give choice, and they should have followed it, and I didn't know they weren't, and this pricing decision was theirs. And –

THE COURT: But what I want you to do, if you go back to your brief – just a second – your original brief, page 8 – I mean – you do cite some particular places.

MS. WINKLER: And if you look, your Honor, those cites are at T2 of exhibit 1.

THE COURT: What I was going to say is you have, you know, your A, B, and C, you have three points.

MS. WINKLER: Yes.

THE COURT: Which is your best?

MS. WINKLER: The best is A.

THE COURT: A?

MS. WINKLER: And those references are at T2.

THE COURT: This is Thurston's false denial of [50] instructing the laboratory to add the Ferritin to the Lab Scan?

MS. WINKLER: Yes, your Honor.

THE COURT: T2.

MS. WINKLER: And behind T2 – and these are also in the supplemental appendix – there are several different statements. The best one is if you turn in four pages to the page marked S at 131 or 2.

THE COURT: 131?

MS. WINKLER: Yes. And where it says: Did you give instructions to any of the general managers for Chicago, Newbury Park, or Phoenix at the meeting that they were to add Ferritin to the chemistry panel? Answer: No, I did not.

And continue to the next page that's marked S at 144: And your testimony is that it was up to the laboratory to decide what to do about that, if anything? Answer: Yes. And that it wasn't your idea or an idea from corporate what to do? Answer: There were options discussed at the Park City meeting, and I discussed options with the general managers. Question: But your testimony is it wasn't your plan, and it wasn't your idea, it was a local plan? Answer: That's correct.

THE COURT: Okay. Hold on. That's good in the sense that that zeros me in on a particular statement.

[51] MS. WINKLER: And if you look right behind that, your Honor, under the next tab that has the abbreviation references, there are some references again out of the supplementary appendix that give you why we believe that testimony is false.

THE COURT: Okay.

MS. WINKLER: So we're at now the fourth tab down. And the first testimony that is there is from Mr. Prichard in San Francisco.

THE COURT: Is this S117?

MS. WINKLER: Yes.

THE COURT: This is Prichard?

MS. WINKLER: This is Prichard.

THE COURT: Was he an immunized witness?

MS. WINKLER: No, not Prichard. I think this was the one that wasn't.

Mr. Brown, will you correct me if I'm wrong.

MR. BROWN: I'll have to look at that.

THE COURT: One of the arguments the defendant makes is, like a jury, I should examine the – scrutinize the testimony of immunized witnesses with particular care, since they have a recognized incentive to shift blame away from themselves.

MS. WINKLER: Your Honor, almost every witness in this trial was immunized.

[52] Mr. Prichard was general manager in San Francisco at the pertinent time. And if you look at – and this was a page that was omitted from the supplementary appendix. You'll see page 128. And then the next page is 129 at the top from that day's transcript, which was December 6, 2001, day 9. At line 8, it says, question: How did it come to pass that Ferritin was added to the Lab Scan? Answer: Well, as I recall, I believe we added it as a result of communications with the Newbury Park office at Damon. Question: Communications between who and whom? Answer: Well, as I recall, I believe it was Mr. Thurston. And who, yourself? Answer: And myself.

On the next page, page 131 –

THE COURT: Let me just ask you this. I have to determine, among other things, whether it was literally false. This says – it's on page 53 of Mr. Thurston's testimony, at 131, you asked, somebody asked: Did you give instructions? And the answer here in part is – to be added as a result of communications with the Newbury Park office? And he says: The communications, as I recall, I believe it was with Mr. Thurston.

But do the instructions – do communications necessarily constitute instructions, in your view?

MS. WINKLER: Some clarification for that may [53] be on the next page, 130, where Mr. Prichard says he was requested to add it at Mr. Thurston's – again, that is not the word your Honor is using; it was a word that Mr. Thurston used, he instructed, but it was requested, and he was his boss. So I believe it's a fairer inference. His boss requested him to do it, so he did it.

But on page 30, lines 5 to 15, he goes on to explain more about this addition of Ferritin to the Lab Scan. And at line 10 it says: And you understood that you were being requested to add the Ferritin to the Lab Scan in San Francisco? Answer: That was my understanding, yes. Question: And that the reasons given to you by Mr. Thurston involved the competitiveness and the value of the test? Answer: That's correct.

THE COURT: And who is Mr. Prichard?

MS. WINKLER: He's the general manager in San Francisco. And on the next page, page 131, at line 18: Is it your best memory that the decision, the final decision to add the Ferritin to the Lab Scan was when you received a telephone call from Mr. Thurston? Answer: Well, as far as the San Francisco laboratory goes, yes.

The next page that's included in this exhibit, your Honor, is government exhibit, I think it's 45 from trial. It's at T at 974 in the appendix, the joint appendix. These are the notes from Jim Carson who was [54] general manager in Chicago.

THE COURT: I actually looked at these before I came in. Carson was immunized?

MS. WINKLER: Carson was the general manager in Chicago.

THE COURT: Was he immunized?

MS. WINKLER: Yes.

THE COURT: And what is it that establishes that these are notes of, I think you say, a telephone call between Mr. Thurston and Mr. Carson rather than notes that were made independently? Does the note itself – it says conversation –

MS. WINKLER: It's in combination. But if you turn in, your Honor, four pages to what's marked at the bottom S at 122, this is from day 10 of criminal trial on December 7, and this is testimony by Mr. Carson. And at line 3: With regard to government exhibit 45, which is the exhibit we're looking at, the record – this records a conversation with Bill Thurston on February 24, 1988? Answer: Yes. Question: The topic is the addition of Ferritin on the standard SMAC panel – that was another word for Lab Scan – is that right? Answer: Yes. Question: Now, was it your idea to add the Ferritin to the SMAC panel? Answer: No, absolutely not. Question: You're sure? Answer: I'm sure I had not planned to do [55] anything to – to initiate that or explore it as an idea.

That's how we know the notes, which are at T at 974 and back a couple of pages in the exhibit are notes at least that Mr. Carson says he had of a conversation with Bill Thurston on 2-24 of 1988, and the first bullet point is: Add Ferritin on the standard SMAC panel. And then there's some analysis of the money that can be made, costs. And it goes on. Down below, there's some – there's a line and then some other things they were considering: Can add a dollar to patient prices, gain $19,000 a month. And then down below that, another line: Met Pat, HDL, one more test. Confirm and get back to Bill Thurston by Tuesday.

Another indicia that this was contemporaneous. That is the Chicago.

He had four laboratories under his direction. San Francisco and Chicago were two. The third one here is Newbury Park. And that's what the next testimony goes to. And this is testimony of Jim Bryant on November 27, 2001. He was immunized. There had been various questions raised in the defendant's brief about Mr. Bryant's credibility. Your Honor, those questions – certainly, the testimony as to Mr. Thurston and Mr. Bryant conflicted. If one accepted Mr. Thurston's testimony as true, he could not have been convicted. Mr. Bryant noticed on a number of different levels things [56] that where he told – well, actually, the best document is the capital expenditure request which – let me go in and go through this, and I'll go back to the question of credibility.

On page – if you look inside on this November 27, 2001 to the next page, it's page 17 of that day's testimony at line 8: Now, as of March 17, 1988, had you been a part of any of the planning with respect to adding the Ferritin to the Lab Scan? Answer: I don't recall being part of that immediate plan. That was handled prior to me, my taking over responsibilities of the main laboratory.

THE COURT: That –

MS. WINKLER: The decision was made prior to him getting there.

THE COURT: But that doesn't tell me that Mr. Thurston made the decision or gave the instruction.

MS. WINKLER: No. And, your Honor, to get to that, it's an inference, because Mr. Eddy (sic) hadn't left, and there was an interim period in which Mr. Thurston

was the manager. And then we go back to the capital expenditure request. And those are the links that you have to draw to get to the instruction on Newbury Park. But it is links.

THE COURT: And did Newbury Park do the San [57] Francisco tests?

MS. WINKLER: Newbury Park did do the San Francisco tests.

THE COURT: And what are the implications of that?

MS. WINKLER: Your Honor, given that the – the Lab Scan could always be done on a particular machine. And you have to understand the way the labs were set up. The testimony was Lab Scan is done on one machine; the Ferritin is done on another. If San Francisco kept their forms exactly like they were and only did Lab Scan and did Ferritin separately, it would have changed nothing, not one thing in the laboratory. In other words, they could have not added the Ferritin to the Lab Scan panel in San Francisco, and Newbury Park could have run those tests just like they did the day before. Nothing would have changed in the laboratory except they would have had a whole lot less Ferritin tests. So the argument does a whole lot when you know what they did in the laboratory.

THE COURT: I don't think I understand what you just – I mean, I hear what you said, but I don't think I understand it.

MS. WINKLER: The evidence at trial was – and the Lab Scan is run on an automated chemistry machine. It can do 24 to 26 tests at one time.

[58] THE COURT: Then you have to go to another machine to do the Ferritin.

MS. WINKLER: Exactly.

THE COURT: That I understood.

MS. WINKLER: And the way it was billed was that one Lab Scan on the one machine got a single reimbursement from Medicare, and the Ferritin got that, essentially, the same amount of money, but a separate reimbursement. So when the Ferritin was added, bundled onto the Lab Scan, what it allowed the lab to do was then split it off and bill both of them every time the Lab Scan with Ferritin was done.

If San Francisco had never changed their practice, had never added the Ferritin test to the Lab Scan, it would have not changed the way the tests were conducted in Newbury Park. All it would have meant was they were just running the Lab Scan. They weren't also running the Ferritin. The argument is fallacious. In other words, when Thurston directs Mr. Prichard to add it in San Francisco, it's to get the revenue. It doesn't have to be done. It had been changed before. Nothing affected the laboratory except there would have been less tests run and less money made for that laboratory.

The other piece on Newbury Park – and it's also – it's corroborative, but not directly on point, your [59] Honor – it's from Shelly Moran, who is the sales manager, and that's the next exhibit behind this particular one, and it's at S at 037 at the bottom. It's page 21 of the November 29 testimony. And she was also immunized. And this is about the bonuses. And from lines 3 to 12, the question is: Did you get a bonus for the increase? Was there an increase in

the Ferritin sales after the Ferritin was added to the Lab Scan? Answer: Yes. Question: Did you get a bonus from that increase? Answer: No. What was the reason for that? Answer: Any corporate instruction to add tests or anything that was done by the corporation for additional revenue was backed out of any bonuses I've ever seen.

Just corroborative of that it wasn't a local decision.

And, finally, your Honor, with regard to Phoenix, Mr. Bigg's testimony is included from December 7, day 10, and it starts at page 121 at the bottom, line 25: Who told you, though, that the Ferritin was going to be added to the Lab Scan? And up on the next page, answer: I heard that – I believe – it's been a long time, but I believe it was a budget meeting or prior to a budget meeting. Answer, after a little interruption: I think it was prior to a budget meeting that included the management team in Phoenix and Bill which, normally, that [60] was the group that met before we had the budget just to make sure everything was in line and in order. At that time, I believe, it was when I was instructed that it would be added to the Lab Scan. And who instructed you? Answer: Well, it came – it came from, to begin with, from Bill and the management team in Phoenix. Bill being Bill Thurston? Answer: Bill Thurston. And then we went to the budget meeting, and it was basically discussed at those meetings. And from that, from those discussions, there was an indication that this was a corporate decision – and that he didn't object because he liked having it.

The best two pieces of evidence are San Francisco and Chicago. Newbury Park and Phoenix take a little more pulling together with the capital expenditure requests.

THE COURT: And San Francisco is which witness, Prichard?

MS. WINKLER: Prichard. And Chicago is Carson.

THE COURT: So, first, you say these are literally false. In other words, he's asked, did you instruct? And he did instruct or direct.

MS. WINKLER: Yes. So that they're literally false because he did. And that it's willful, that we know it's willful, because he's denying participation in [61] the conspiracy.

THE COURT: But I don't think – I think that's a little circular. You have to show, for example, that he didn't forget. Let's say he didn't give the instruction. But if he forgot that he gave the instruction and, for that reason, didn't acknowledge that he gave the instruction, that would not be willful for the willful prong of perjury.

MS. WINKLER: Your Honor, given that he recognized that he was at the budget meetings and dealt with these capital expenditure requests and that those were his signatures, it is inconceivable that it's something he forgot.

THE COURT: I mean, I didn't sit through the trial. Tell me about the budget meetings and the CERs.

MS. WINKLER: If you will look in second tab of exhibit 1 toward the back of it.

THE COURT: The one that says refs?

MS. WINKLER: Yes, references. It was an early morning abbreviation. And if you look at the one at the

bottom marked T at 913. It's from the back of that section, seven pages in.

THE COURT: Mine goes from 904 to 927. I have it.

MS. WINKLER: Okay. This is the – P2 was [62] second quarter was the testimony at trial. It was the second quarter revenue improvement meeting. These were what were part of the capital expenditure requests that justified the expenditure for the machines. This document, while it looks like a lot of math, is important. And the ones for the other laboratories were equally important.

Point one is Ferritin addition to the Lab Scan profile. This is for San Francisco. What it shows you in that first section is the revenue at $9,439 a month is coming – well, where it's coming from is the Medicare program. If you see the loss in revenue, client, that's doctors. Those are the people who are going to get it for free, and they're going to lose $2,070 in legitimate revenue from the doctors because they're going to get the tests for free, while the Medicare program is going to pay full freight.

A similar one was done for Newbury Park. If you go backwards to the one at 901, and I've only included two pages of it in the exhibit. It's 901 and 904. Those are the important ones, although there's another piece of it that says it's to offset the Medicare reduction.

THE COURT: Where is that in here?

MS. WINKLER: If you go back toward the front of the exhibit, it's the ones marked at the bottom T at [63] 901 and T at 904.

THE COURT: Okay.

MS. WINKLER: And you'll see a similar document for Newbury Park. The front page is the capital expenditure request where you'll see handwritten on there, revenue enhancement. And if you see down at regional vice-president, that's Bill Thurston's signature. He signed each of these. And the date, April 19, '88. They were having meetings in Needham Heights for these to discuss the revenue improvement to take care of the loss in revenue.

THE COURT: Actually, let me look at this.

MS. WINKLER: Okay.

THE COURT: This document says: Add Ferritin to Lab Scan panels, correct?

MS. WINKLER: Yes.

THE COURT: And it says: Revenue enhancement?

MS. WINKLER: Yes.

THE COURT: And it's signed by Mr. Thurston?

MS. WINKLER: Yes.

THE COURT: So that tends to prove that he knew that the Ferritin was being added to the Lab Scan panels. But did he testify that he didn't know that? Because what we've been focusing on is whether he instructed on it. And I'm not saying that knowledge is irrelevant to [64] that, but it's not the same question.

MS. WINKLER: The point I was getting to is that he could not have had faulty memory or forgotten. This was too big a deal.

THE COURT: Forgotten whether he instructed?

MS. WINKLER: Yes, forgotten whether he instructed. It was too important to the success of the laboratories under his direction to just forget.

THE COURT: And, of course, you can prove any point through direct or circumstantial evidence, and you have to establish context often, but this most strongly tends to prove that he knew. But you're not contending he committed perjury by testifying that he didn't know that Ferritin had been added, are you?

MS. WINKLER: No, he knew that Ferritin had been added. He did not testify that he didn't. But he testified that he had no reason to think they were medically unnecessary. And he testified that he didn't direct the addition. And it was the direction of the addition to obtain the revenue from tests that were, which he had reason to know, had not been ordered before. And it went from, as the First Circuit noted, a hundred and some to 9,000 and some overnight. That's where the – that is the best – I mean, the others are there as well, but that is the best. It is the direction to the [65] general managers. I think you asked me to go for the strongest one. That's the strongest one.

THE COURT: And why was it material in terms of having the potential to influence the jury? I think that's the test of materiality.

MS. WINKLER: Because it goes to whether he joined, willfully joined a conspiracy to steal from the Medicare program. If he directed them to do it, it's material that he joined.

THE COURT: Okay. Because I think what I'd like to do is get either now or perhaps break for lunch and right after lunch get the defendant's response on this instruction point.

Do you have a sense about how much time you would like?

MR. RUSSONIELLO: I'd like to do it now so that the court can think about it over lunch, because this is one of the areas – if you wanted to find a place where you really would begin to have your blood boil, I mean, this is it. You have to –

THE COURT: I think I'd rather have my blood boil after lunch.

MR. RUSSONIELLO: Well, my blood will boil now, if you don't mind.

THE COURT: Go ahead.

[66] MR. RUSSONIELLO: Because I think that you have to – you ask yourself the questions. When you look at all of these examples of evidence of perjury at trial, which we've addressed, by the way. The specific pages about the instruction to the different laboratories, at our reply brief, pages 7 through 15, we had gone through everything that we could sort of conjure up as a possible testimonial point. We didn't address this newly found matter about the denying being part of the conspiracy, which is a bit absurd, I mean, quite frankly. Any denial of an accusation in an indictment would, in effect, implicate a person in perjury because they put the government to its burden of proof here.

But that aside, the fact is that we have, I think, identified and addressed every single one of these different components here in our reply brief, pages 7 to 15. And, in particular, people like Bryant, who the court said – the court said, probably the least credible person – this is also in our brief, in our reply brief at page 19 – least credible of all the people who testified.

THE COURT: Actually, as I looked at this, I think – let me get your brief and tell me where in the record I find Judge Harrington saying –

MR. RUSSONIELLO: It's in our reply brief, page [67] 19, and the excerpt from the brief then would be –

THE COURT: From the transcript.

MR. RUSSONIELLO: Right. There's actually –

THE COURT: Here it is. I checked it this morning. It's 12-7-01 at 184.

MR. RUSSONIELLO: That's right. And there's actually an excerpt of the exchange with the court about Bryant.

THE COURT: I know, I read it.

MR. RUSSONIELLO: So the point is –

THE COURT: Excuse me.

(Short pause.)

MR. RUSSONIELLO: There's good reason to have a sort of fundamental rule that you treat with caution the testimony of persons who have been immunized.

THE COURT: Hold on just one second.

(Short pause.)

THE COURT: 184. Judge Harrington says:

Because of all the witnesses in this case, Bryant was, in my view, the least credible.

Now, I know all of this is intimately familiar to you, but not to me. Bryant is from which lab?

MR. RUSSONIELLO: Newbury Park. We have beginning at page 18 of our reply brief through pages – through page 21. So three pages devoted to the Newbury [68] Park issue.

THE COURT: But, actually, the government was relying in part on Newbury Park, but more on Chicago and San Francisco.

MR. RUSSONIELLO: Right, and we've addressed each one of them. We talked about Carson. You know, Carson – this, again, is a little bit of the slight of hand here. I mean, I don't throw these phrases around lightly here. But Carson, the excerpt here that is sort of damming him of Thurston's testimony is his direct testimony. The cross-examination of Carson, as the courts have almost from the common law, recognized that it's the cross-examination which is the test of the search for truth.

THE COURT: So point me while we're here to the parts in the cross that are helpful to you.

MR. RUSSONIELLO: Carson, page 12 of our reply brief through half of 13. I hate to read something that's already part of our brief. But Carson's credibility was called into serious doubt on cross-examination with

regard to these documents and so on. This is – the government suggested – this is citing from the brief at page 12 – the government suggested that a page of Carson's handwritten notes identifying the option of adding Ferritin to Lab Scan, [69] page TA 975, was based on a telephone conversation with Thurston, not Carson's original thoughts. Those notes also stated that two Chicago employees would have performed financial analyses relating to the addition of Ferritin to Lab Scan. Counsel – Thurston's counsel demonstrated that in fact Carson received on March 1 two memoranda from those employees, addressed to him as general manager, summarizing those financial analyses. Carson resisted the obvious connection between his notes and the memoranda, and the trial judge, apparently incredulous, emphasized Carson's lack of credibility through questions of his own. And there's a reference there to the record, T at 91 to 94.

THE COURT: I read that this morning too. Let's look – I don't think they were discussing directly the telephone conversation on those pages, were they?

MR. RUSSONIELLO: Carson, in effect, was saying here, to paraphrase the brief, that he wasn't even the general manager.

THE COURT: So he was minimizing his role?

MR. RUSSONIELLO: Right.

THE COURT: I got that.

MR. RUSSONIELLO: What I'm saying here is that – and we all have had – probably done perjury prosecutions in our time. And the fact of the matter is [70] that Prichard is a prime example here. If you wanted to set up a false statement given by a witness at the trial and it

involved a conversation had with someone else, you wouldn't use synonyms for "instruct, direct, discuss, suggest, recommend," you would use the word. Were you instructed? Were you ordered? And you'd have somebody saying, I didn't order him, and you'd have somebody saying, I was ordered. You don't have that. And so this sort of amorphous, somewhat amorphous insinuation to be drawn that these words all mean the same thing in the context of using it as a foundation for perjury is a stretch, in my judgment, but it's very important to ask the question, why would the government spend so much time and why only today would it actually excerpt what it says of the specific references in the record to perjury? Why would they waste all of their time on this? It's because it's the only justification that they can come up with, the only plausible justification for explaining the disparity, because the claimed justifications for disparity that – we know that cooperation is not in play, so the normal kind of disparity is not here in this case. The notion that Isola was convicted of something different than what Thurston was convicted of is factuous.

THE COURT: I mean –

[71] MR. RUSSONIELLO Especially when you consider the court mentioned that Isola was actually originally charged with more than what Thurston was actually convicted of. There's another significant part of what Isola was charged with that Thurston wasn't even a part of, and that was what Jerry Cullen went to trial on, which was not the bundling scheme quote-unquote but the unbundling, this whole dialysis component.

First, the reason that there was a separate trial for Cullen and that went first was because Thurston's motion

to bifurcate, because the claim was that Cullen's conduct was so much more noxious because of the use of dialysis patients as kind of a part of this, that, therefore, Thurston would be contaminated by the evidence that came in against Cullen.

The government said after the court ruled, I can't bifurcate the charge because it's a single count indictment, but I can bifurcate the defendant's [sic]. And the government – who do you choose to try first? And the government at that time said, we'll try Thurston first, who was then represented by Mr. Wall. Mr. Wall then took sick and was unable to proceed. Cullen went to trial first. Rule 29. Not on some – and this is another ground here that the government suggests to you that the Isola plea is an aberration because they were fearful [72] that there might be a Rule 29. They should have been fearful that there might be a Rule 29, not because of a predisposition of the court, but because, you know, as we know from the historical record here, the scheme that the government was contending was criminal conduct was only until – was as of at least December '92 when Bill Braniff (sic), the US Attorney in San Diego, indicted National Health Labs was, in his own words, probably believed by most to be illegal.

And so when Cullen went to trial and the court ruled in his favor on Rule 29, it was not because of some, you know, sort of predisposition, but rather because the government couldn't identify that there was anything in the regulations of the – of HICVA (sic) or the health and human services department that prohibited the laboratory from doing precisely what it did. The court made a finding that the laboratory was not required to take the path of least costs. It just had to abide by the laws and regulations, and it did.

When Mr. Thurston then, you know, asked us to represent him, substituting in for his counsel, and going to trial, you know, on that, it was on a piece of the case, not what had been the more noxious Cullen. That was never charged against him. But it was on the slenderer piece of the Apol and Ferritin. And, of [73] course, as the court has correctly noted here, if the government felt so strongly that it had sufficient evidence to prosecute Mr. Thurston for Ferritin, it had more than enough reason to have suggested to the court when Mr. Isola was allowed to plead nolo contendere, allowed to plead nolo contendere – something that even the government acknowledges it's against its office policy and it is against the policy of the Department of Justice to accept nationwide – sits there, you know, abiding this, doesn't put any evidence of –

THE COURT: Well, they returned an information that narrowed the charge.

MR. RUSSONIELLO: That's right, as a part of a kind of –

THE COURT: So they weren't just passive in it. Eventually – and it's going to have to be after lunch. You're going to have to come back, and I am going to look at the particular pages that you say, you know, at least that defeat the contention that instruction is perjury. But this is okay because this is the kind of overview I wanted.

MR. RUSSONIELLO: Just to finish a thought, just take a minute, if I can, just to finish up a thought, and it is – the fact of the matter is that Isola's plea and the agreement to that particular [74] sentence, not putting any evidence of amount of loss or intended loss, accepting the nolo contendere plea, waiving all the appeal rights, set as it were a kind of benchmark. It didn't change Isola's

involvement in the scheme. All it did was it sort of distorted what the rest of the country would see if they were looking at Guidelines, national Guidelines. What they would see was a disposition of a case involving the president of a corporation involved with major Medicare fraud.

So the government's suggestion here that they were different, that they were different positions that they assumed in the company, had different levels of culpability, that there were different charges –

THE COURT: Well, the idea that there were different charges carries no weight with me. They were the same charges, as I understand it, and you should correct me if I'm wrong, until they returned the information that narrowed the charge.

MR. RUSSONIELLO: More significant charges, actually, against Isola than against Thurston, because he was not charged, specifically not charged with a component of the scheme that involved the dialysis unbundled.

THE COURT: The government argues that the evidence was stronger against Mr. Thurston than Mr. [75] Isola, but Judge Harrington said Isola was the prime architect. Do you want to respond to the contention that maybe they agreed to something less because they had a weaker case against Isola?

MR. RUSSONIELLO: The government investigated this case for six or seven years. Isola was the key person here. The evidence against – that sort of put Thurston on notice of what was being done here as a kind of revenue enhancement was the CERs, you know, these capital expenditure reports, which Isola signed.

So if the evidence, you know, is that, as it's coming from these other witnesses here, that this is corporate decisions being made about how to enhance revenue, and the vehicle for doing that is the CER, the president's fingerprints and signature are on the document, as it were.

If the government had come before the court, this court, the First Circuit, even the Supreme Court, and said, the reason that we did this deal was because we wanted to get Wilke (sic) far out of the case because they were the sort of the 400 pound gorilla with all their resources here defending the president of the company so that they leave Cullen and Thurston, basically, to their own devices, the lawyers from San Francisco and Mr. Wall. I have more confidence that that [76] was the true reason that this case was disposed of the way it was than the notion that the evidence against Isola was weaker.

THE COURT: Well, some of this – I mean, I'd have a better feel for this if I had been the trial judge. But I really – I know this is very important to everybody, so I'm trying to get deeply into it. But part of this is an objective matter, and that's why I cited something that none of you cited, and that's part B with regard to plea agreements. The government entered into an agreement here. And when the government does that, it's representing to the court that, you know, this sentence adequately represents the actual conduct. And it goes right on in the next paragraph to talk about relevant conduct.

I've got a sentencing tomorrow – it's mentioned, I think, in one of the Ferrara decisions – of two members of the LCN, and the government has agreed not to provide any evidence of relevant conduct. So in some cases the

government tells me properly, judge, it's improper for you not to take – unlawful for you not to take relevant conduct into account. In Simone and Gioacchini tomorrow – I'll give you the plea agreements, actually, now – you know, they're going to make it impossible for me to take relevant conduct into account. [77] So the adversary system won't work. And this is something I've wrestled with, because Mr. Thurston is guilty, and I'm not here reviewing whether he's guilty. I think he's guilty. And if this came to me clean, I agree with Judge Lynch one hundred percent. I mean, I think it's a very serious crime. And if I reopen this and do intended loss, you know, it will be what it will be, but it looks to me, you know, like it was a big loss, and I think defrauding Medicare is a real problem and, frankly, I don't like to be in this position, because if I had presided in a case where somebody was convicted of defrauding Medicare of – attempting to defraud Medicare of this many million dollars, you know, I think a five-year sentence is perfectly appropriate. But my present perception is the government created this dilemma, and we're in this universe related to white collar crime where, you know, where there are complicated cases, and it's hard for companies not to settle because they risk getting debarred, and then you've got the individuals. And I always think the individuals should be prosecuted.

If you read my C. R. Bard decision from about ten years ago, you know, if this had been my case and you came to me and you said, take a plea from the corporation, let the individuals go, I would have [78] resisted that, because corporations act through individuals. So this is serious.

You know, on the other hand, I don't know as a judge, and I'm concerned about respect for the law, and I don't

think that a sentence should communicate the message that this is all up to the government, and if you want to exercise your constitutional right to a trial, you're going to get five years in prison, but if you say "uncle" and give up, even if you think you're not guilty, and we do have cases sometimes where people think they're not guilty, and they're wrong, they're guilty, that, you know, in terms of promoting respect for the law, I mean, that hurts. And I know each of us District Judges have our idiosyncracies, and the prosecutors try to adjust to them to some degree. But – that's what I'm wrestling with.

MR. RUSSONIELLO: One final thought here, and that is this. I mean, I think that we're all committed to this system and this process, and we want honesty and integrity in it, and we know how important the message is. And so what upsets me most is the notion that the Isola disposition is somehow justifiable and explainable. And I put this rhetorical question. When was the last time you ever saw the government waive the preparation of a presentence report? And what does the waiver of the [79] presentence report suggest in terms of whether this was really an arm's length, you know, do the best we can under the circumstances disposition, or something else?

THE COURT: Well, it relates to the point of whether there's just too much weight going to trial. I mean, these cases are hard to try, so there's good reasons for some flexibility. And you never can tell what you'll be able to prove and what you won't be able to prove. And the First Circuit has said it's not unconstitutional to offer a much better deal to somebody before trial than after trial.

On the other hand, you know, after Booker, when sentences, among other things, are supposed to promote

respect for the law and not involve unwarranted disparity between codefendants is what I'm trying to get at.

It's perfectly appropriate for you to give me that context. But when we come back, I want you to sort of take me through some of your cites on this issue because, mainly, the government has got three perjury charges, three counts of perjury is the way I look at it and, if it proves one of them, you know, you've got obstruction of justice and, arguably, you have a material distinction between Isola and Mr. Thurston. If you don't prove any of them, you understand what the implications of that may be.

[80] All right, it's 1:15. Why don't you come back at 2:15. And then I am going to ask the government to take me through those other two as well, the other two perjury charges, because that's very helpful to me. And we'll see where we go.

Let me ask you a question. And maybe you've all been at this so long it's impossible, probably is. But have you had any discussions about trying to resolve this case at this point short of a decision by me that the only thing that can be said with certainty about it is that it will go back to the First Circuit?

MR. RUSSONIELLO: We did. We had a discussion – I think I'm summarizing what was the discussion –

THE COURT: Don't tell me what the substance was.

MR. RUSSONIELLO: No, it's just that we thought it would be a good idea to. That was the extent of it.

THE COURT: And I can't get involved in plea discussions. I'm not trying to do that. But – and, again, if this were my case, ordinarily – it is my case now, but I would have said previously, you know, there are limited resources. The government – it's right in your brief – the briefs have been excellent. You didn't have that much time to do it. But when you were dealing with Mr. Isola, what was very important was to get a [81] conviction, and you got a conviction here: You know, when it comes time for me to decide this, I'll say what I think and make myself as clear as possible so people will know where it came out, and there's a fair chance nobody will be happy. But if you resolve this matter before I decide it, then nobody but me will know what I think. And I may not even know because I won't have heard everything or made up my mind.

Do you want a little longer lunch break to talk a little further?

MR. RUSSONIELLO: Maybe that would be a good idea.

THE COURT: Is the government receptive?

MS. WINKLER: It would be fine, your Honor.

THE COURT: Why don't we say 2:30, because this is important, and you've sure treated it like that. On the other hand, there are probably people out there doing similar things or worse. And as long as the government's dealing with Mr. Thurston, and it's got to do what's necessary to get to a conclusion, there's an opportunity cost, and somebody might be getting away with something as we speak.

So I'll see you at 2:30.

(Luncheon recess.)

[82] AFTERNOON SESSION

THE CLERK: Court is back in session. You may be seated.

THE COURT: We have counsel and Mr. Thurston.

I mentioned before the break that I have this sentencing tomorrow in a case where the government agreed that it will not seek an evidentiary hearing or otherwise offer evidence to prove the counts that are being dismissed or other uncharged offenses at sentencing, essentially, relevant conduct. I don't know whether it's going to prove to be relevant or material to my analysis, but since I mentioned it, I think I ought to give you copies. So I'll make the March 15 plea agreement in United States versus Frederick Simone exhibit 2 and give you copies, and the February 1, 2005 plea agreement with the defendant that has the same pertinent provision, exhibit 3; that's Mr. Gioacchini.

Mr. O'Leary will give you copies.

(Documents passed.)

THE COURT: During the break, I reviewed some of the references in Mr. Thurston's reply memo. But I think it would be useful to go back. I mean, I've got this allegedly perjurious statement that Mr. Thurston instructed. I saw that Mr. Wilson from Phoenix, at least, seemed to be testifying that he wasn't instructed, [83] that he participated in some local iterative process that didn't involve instructions or directions from Mr. Thurston.

But what would you like to particularly point me to?

MR. RUSSONIELLO: I would like to start with and address specifically the T2 and the T3. I think we've talked about the T1, which was the general I didn't participate in any conspiracy. I think that we've dealt with that as much as I think I need to. But I would like to – there are two subsets identified by the government this morning as T2 and T3 in which they first section out what they identify as Mr. Thurston's testimony at trial, which they contend are the false statements. And then in the references behind each of those tabs, they identify the specific excerpts of record, either testimonial or documentary or both, that refute, and not just refute but that contradict his statements. So I'd like to deal with each of those if I can.

THE COURT: That's what I want you to do.

MR. RUSSONIELLO: So T2, the government actually has four excerpts of record here. In the first, it is Mr. Thurston's testimony that from his appointment as regional vice-president, without designating when that was, to the Park City meeting, without designating when [84] that was, but I believe the record would show that it was sometime in early 1988: Did you have any responsibility for overseeing how panels were announced?

THE COURT: Actually, I don't know that she's – I think we need to look at T2, and I thought the alleged perjurious statement was: Did you give instructions to any of the general managers for Chicago, Newbury Park, or Phoenix at that meeting? – so, actually, there's a particular meeting we need to focus on – that they were to add Ferritin to the chemistry panel?

MR. RUSSONIELLO: Right. Well, the first excerpt of record is what I've just cited.

THE COURT: And what's the meeting?

MR. RUSSONIELLO: The meeting is the Park City meeting in January of 1988, which is identified in the first excerpt of record in tab 2. So it's up until – literally, it's from the time that you were vice-president until January of 1988, did you have any responsibility for overseeing how panels were announced?

THE COURT: What page are you looking at?

MR. RUSSONIELLO: This is page 48, lines 14 through 25 under tab two.

THE COURT: Under tab 2 of what they gave me this morning?

MR. RUSSONIELLO: Yes.

[85] THE COURT: T2?

MR. RUSSONIELLO: T2. It's the excerpt of record of December 10, 2001.

MS. WINKLER: He's referring to one I did not reference this morning. I skipped forward to the next one.

THE COURT: What does it say on the bottom of the page?

MR. RUSSONIELLO: It says S at 125, 129, 141.

THE COURT: It's not in mine.

MR. RUSSONIELLO: Well, if they're withdrawing it, then I'll save my breath.

(Short pause.)

THE COURT: Okay, I see it.

MR. RUSSONIELLO: And I think that it was probably a setting up the question is probably why it's somewhat innocuous here, but it basically was because the second excerpt, which is at S at 131, it's page 53, lines 13 to 17, is: "Did you give instructions to any of the general managers for Chicago, Newbury Park, or Phoenix at that meeting that they were to add Ferritin to the chemistry count?" No, I did not.

Now, it's specifically three labs, Chicago, Newbury, Phoenix, no reference to San Francisco in there.

And then the third excerpt of record is –

[86] THE COURT: And it focuses on one particular meeting.

MR. RUSSONIELLO: Yes, Park [C]ity. This is January 1988, because the reference there is, again: Did you give instructions to any of the general managers at that meeting? And you needn't go any further than the six lines above that excerpt because it says, question: Was there any consensus that developed at Park City about what the solution would be across the board for Damon?

So we're still talking about or they were still talking about Park City. So it's January 1988. It's did you give instructions to any of the general managers for Chicago, Newbury Park, or Phoenix at the meeting that they were to add Ferritin to the chemistry panel?

And then the next excerpt, the third excerpt of record, and it follows immediately. It's S at 144, page 21, beginning at line 1 through line 10. Question: And your testimony is that it was up to the laboratories to decide what to do about that, if anything? Answer: Yes. And that it wasn't your idea or an idea from corporate what to do? Answer:

There were options discussed at the Park City meeting, and I discussed options with the general managers. Question: But your testimony is it wasn't your plan and it wasn't your idea, is that – it was a local plan? Answer: That's correct.

[87] And then the fourth excerpt is immediately following at page 23. This is S at 145, page 23, lines 21 through 24. Question: Your testimony is that each of these labs decided on their own to implement the Ferritin as a part of the Lab Scan that; there was no national program to do that? Answer: There was no national program to do that.

So that last excerpt by itself is a sort of compound question, only the second part of which is answered. Because it says each of the labs decided on their own to implement the Ferritin as part of the Lab Scan, that there was no national program to do that. The answer: There was no national program to do that.

So those are the excerpts of record that relate to this instruction, ordering, directing to the general managers. And in contrast to that, the government then offers first and foremost in its references the testimony of Prichard, Mr. Prichard, James Prichard.

THE COURT: Prichard's in which lab?

MR. RUSSONIELLO: San Francisco, which was not one of the three labs referenced in the questions about Park City. We're splitting hairs here.

THE COURT: We're not splitting hairs. We're talking about perjury if there's a plausible explanation.

MR. RUSSONIELLO: Absolutely.

[88] THE COURT: Was Mr. –

MR. RUSSONIELLO: Prichard.

THE COURT: I was going to say, was Mr. Prichard at the Park City meeting?

MR. RUSSONIELLO: He said he was. In the excerpt of record, page 130, line 10, which I believe is part of the submission. It's one of the reference points, because it's actually one of the points that the government is contending is evidence of the perjury, that he had a conversation in – at the Park City meeting about the addition of Ferritin. What does he say? I mean, first of all, he's not one of the people who was mentioned by position in the question, so it should be dispositive there.

But even going beyond that, not to waste a lot of time here, but even beyond that, what he says is question: Now, you've just given us some information who said those things. Answer: Well, those were things that I recall being in the context of the request, as I saw it, from Mr. Thurston and from Damon's Newbury Park facility. Do you understand that you are being requested to add the Ferritin to the Lab Scan in San Francisco? Answer: That was my understanding. Question: And that the reasons given to you by Mr. Thurston involved the competitiveness and the value of the test? Answer: [89] That's correct.

Well, what he says at page 131, if you follow the next page, which is actually not part of the excerpted portion, that is, the portion that's been highlighted by the government here, at line 10 of page 131, he says – let me read the question beginning at line 6. Question: Was there a session at that meeting with the general managers and Mr.

Thurston and Mr. Isola present, among others, where the subject of adding a test to a panel or profile was discussed? Answer: Yes, I believe there was a general discussion about looking at different options for adding tests to different profiles within Damon's service package. Which is precisely what Mr. Thurston has testified to. Answer – question: Do you recall any decision being made at that meeting to add Ferritin to the Lab Scan? Answer: I think it was one of the options discussed, but I don't honestly recall whether it was finalized at that meeting or not.

Then the excerpted portion, question: Is it your best memory that the decision, the final decision to add the Ferritin to the Lab Scan was when you received the telephone call from Mr. Thurston? Answer: Well, as far as the San Francisco laboratory goes, yes.

Now, as we have said in our brief at page 11, the reply brief, at the time that Mr. Prichard was the [90] general manager of San Francisco, the tests for San Francisco were done by Newbury Park because San Francisco didn't have a lab. It was a region or a section, an operation of Damon Laboratories. But it basically looked to Newbury Park to do its tests. So whatever Newbury Park did, San Francisco had to adopt.

So, does Prichard in any way in his testimony impeach even, much less refute, contradict, and form a basis for establishing a willful falsehood as to a material fact as to Thurston's testimony? I don't think so.

Carson is the next excerpt of record that is referenced by the government here as to this subset. And the government has specifically identified two documents as to Carson, designated as T at 974 and T at 975, which we've identified in our brief and which the evidence at trial was

very clear, may not be documents of the same discussion, that is, they were not – if they were both made by Carson, they were not necessarily made by him at the same time. They do not necessarily reflect telephone conversation notes of a conversation that he had with Thurston. And before we get into the specifics of what's contained in them, just look at the format of them.

The first page which is T at 974 looks like a summary. It looks like a recapitulation that someone has [91] done. As contrasted with T at 975 which, arguably, may have been made simultaneously, somebody with good penmanship who's writing something down as he's talking to someone else. What does it tell us?

THE COURT: Actually, hold on just a second.

MR. RUSSONIELLO: Sure. This is under reference –

THE COURT: I have it.

(Short pause.)

THE COURT: Go ahead.

MR. RUSSONIELLO: So if we look at T at 975 – and, remember, as we pointed out here, this is a person that the court specifically commented was somewhat incredible in his testimony, as we discussed earlier this morning, and someone who was immunized.

THE COURT: This person was immunized, and this is the one that Judge Harrington said was the least credible?

MR. RUSSONIELLO: No, that was Bryant. This was Mr. Carson from Chicago who tried to take himself

out of the role of being a general manager. In other words, he said, I wasn't a general manager during the time period that he supposedly was receiving some instructions that he should be his general manager, adding a test, and he said, I wasn't even the general manager. And we tried to [92] rehabilitate him for purposes of showing certain memos that he had gotten in his capacity as general manager, and he was somewhat disapproving of that even.

But what he shows us here on T at 975 in his own handwriting is right at the top is options, not directions to add, but options to add. And one of those is to add Ferritin to SMAC, whatever that – that's an acronym for the panel, basically. But also to add FE, which is iron. Also to add FII, T7s. Or to add cholesterol, HDL, LDL. And further on down in subset 2, Cotiel (sic), who the record will show is sort of the financial officer of that lab, you might say, was going to set up an analysis of what the effect of these would be.

So options is what was discussed at Park City. Carson isn't claiming that he was at Park City and got any instructions to do it. All he says is that it wasn't his idea to do it.

And so I think that with respect to him and his testimony, he provides no real valuable information here, either in documents or in testimony that impeaches Mr. Thurston.

The third proffer is with regard to Mr. Bryant. Now, the excerpt of record as to Mr. Bryant is set out at page 17, line 8 to 13. Question –

[93] THE COURT: Hold on a second.

(Short pause.)

THE COURT: Okay.

MR. RUSSONIELLO: Now, as of March 17, 1988, had you been a part of any of the planning with respect to adding the Ferritin to the Lab Scan? Answer: I don't recall being part of that immediate planning. That was handled prior to me – my taking over the responsibilities of the main laboratory.

THE COURT: What is the significance of March 17? Is that the date of the Park City meeting?

MR. RUSSONIELLO: No, the Park City meeting is in January of 1988. March of 1988 is the date of a subsequent meeting in Newbury Park, I guess it is, about a meeting that he attended at which there was supposedly some discussion that we'll come to later, because he's a sort of cornerstone of the claim that there was a directive not to advertise. This is the second leg in T3. This will be in T3. So the March '88 is when, supposedly, the discussions took place about not advertising that you could get Ferritin separately.

THE COURT: Hold on. Ms. Winkler seems impelled to interrupt.

MS. WINKLER: It's the March 17, 1988 date. The reason it matters is because it was the submission date [94] for the capital expenditure request from Newbury Park for adding the Ferritin, which was prepared before Jim Bryant ever got there. And it's at T at 901. It's also in that submission I gave you behind the second tab, and it's, unfortunately, in the middle where it's hard to find, but at the bottom it says T at 901.

THE COURT: I'll give you a chance to respond.

MR. RUSSONIELLO: We'll discuss that, because T901 is one of these capital expenditure requests identified as a justification for buying equipment. And buying equipment, the RIA, the machine that will be used to do the Ferritin tests on. But it is not – it doesn't evidence that Mr. Thurston directed Bryant to add Ferritin. What the government says is the significance of the document is that it was so – it's one of those documents that is so essential to the sort of corporate knowledge that Ferritin was going to produce revenue that it would be impossible for someone to have faulty recollection about his having ordered Ferritin to be added, which is a nonsequitor [sic]. I think the court picked up on in this morning that the fact that a person knows that a test is going to generate revenue doesn't mean that the person knows or remembers or was the person who directed that the test be added. And there's nothing about this that, this particular document, that would [95] show otherwise.

But, in any case, getting back to the excerpt of record, there is nothing about the excerpt that I have just recited here from Mr. Bryant with regard to being directed to add Ferritin that in any way challenges Thurston's testimony.

THE COURT: When was Mr. Thurston testifying, in 1991?

MR. RUSSONIELLO: No, the trial was in 2001.

THE COURT: I'm sorry, I misspoke.

MR. RUSSONIELLO: 2001.

THE COURT: And he was testifying about a meeting that occurred 13 years earlier?

MR. RUSSONIELLO: Yes, 13-year hiatus. And we didn't even have – not that we didn't have – there wasn't the benefit of some civil case with depositions and other kinds of things in the interim that would have sort of firmed up any of the testimony. But we'll see with respect to one witness who was interviewed in 1996 that his testimony was considerably different in 2001 when he testified compared to what he had given as a statement.

But taking one thing at a time here, as to Bryant, there's nothing about his testimony that bears on this issue.

[96] The next is Shelly Moran who testified, reflected at S at 037. The excerpt of her testimony is at page 21, lines 3 to 12. And all that she says – I won't paraphrase. I'll just read it. It's very brief, the part that's been highlighted. Question: Did you get a bonus for the increase? Was there an increase in the Ferritin sales after the Ferritin was added to the Lab Scan? Answer: Yes: Did you get a bonus from that increase? No. And what was the reason for that? Answer: Any corporate instruction to add tests or anything that was done by the corporation for additional revenue was backed out of any bonus that I would receive.

Well, the government would like you to draw the inference from the fact that she didn't get a bonus that this was a corporate decision, that it wasn't a decision made by general managers, and, therefore, this impeaches Bill Thurston's testimony that the general managers made the judgment.

THE COURT: And you would argue that even if it was a corporate decision, it doesn't – if I believe it, it's not direct evidence that it was Mr. Thurston's decision or

that he gave instruction as opposed to Mr. Isola's decision or just she knew that it came down from on high.

MR. RUSSONIELLO: And we're going to see, [97] because Ms. Moran shows up again when we discuss, as we soon will, the suggestion here in tab 3 that the doctors were not going to be charged for it and that there was going to be a concealment, basically, of this, that Beno Kon, who was one of the original indicted but now deceased members, was actually identified as the person. He's a corporate officer. He's the chief financial officer. He's the one who was directing, specifically, in the testimony of two of the witnesses that a specific test be added and that it be added at no cost, that the Ferritin test be added. And it is Shelly Moran who is identified – I have to backtrack on this in a minute, but it's Shelly Moran who basically says, it's Beno Kon. And it's another person who was present who says it was Shelly Moran who was the one who objected to charging for it because it would be anti-competitive.

Finally, Mr. Biggs, who was from Phoenix, the excerpt of record offered by the government here is that at page 121, beginning at line 25, question: Who told you, though, that the Ferritin was going to be added to the Lab Scan? Not who directed you to, who told you that, I add here editorially for emphasis. The answer he gives: "I heard that, and I believe – it's been a long time – but I believe it was at a budget meeting or prior to a budget meeting." The Court: Pull back a bit so you [98] don't get that stack. Witness: Okay, is that better? Answer: I think it was – it was prior to a budget meeting that included the management team in Phoenix and Bill, which normally that was a group that met before we had the budget just to make sure everything was in line and in order. At that time, I believe,

was when I was instructed that it would be added to the Lab Scan. Question: And who instructed you? Answer: Well, it came, it came from, to begin with, it came from Bill and the management team in Phoenix. Question: Bill being Bill Thurston? Answer: Bill Thurston. And then when we went into the budget meetings, it was basically discussed at those meetings. And from those discussions, there was an indication that this was a corporate decision. Question: I take it, though, as sales manager in Phoenix, you didn't object to inclusion of Ferritin in the Lab Scan? Answer: Not at all. Not at all.

Well, Mr. Biggs testified that – and this is in the excerpt, although it's not the highlighted portion, but it's at page 121, beginning at line 14. Question: Now, at some point in those years '88, '89, '90, to your knowledge, was the Ferritin test added to the Lab Scan? A three-year period. Answer: Yes. And how did you find out about that? Answer: Hmm, probably a combination of things. There was field pressure to add Ferritin to our [99] profile. This was a competitive issue. Being sales manager, obviously, I was very concerned about being competitive with everyone else. I am assuming that was the issue across the country because we had budget meetings and follow-up meetings. That was really a corporate issue as well. Ending at line 24.

He's the sales manager; he's not the general manager. He says that in a 1996 interview – we mention this in our brief – he was interviewed in 1996, which was five years before his testimony, presumably eight years after the events, that he recalls the meetings. No mention of Thurston even being present at those meetings.

We've identified from the transcript the testimony of December 7, 2001 at page 150.

THE COURT: Now we're out of the government's –

MR. RUSSONIELLO: We're out of the government's proffer.

THE COURT: And is this in the special appendix or do I have to go to the trial transcript?

MR. RUSSONIELLO: Trial transcript, please.

THE COURT: Want me to go to 150?

MR. RUSSONIELLO: 150, please.

(Short pause.)

THE COURT: I have it. Want to go to line 14?

[100] MR. RUSSONIELLO: Sorry, I'm sort of interpolating this from our brief and relying on the accuracy of what's contained in there, but I wanted the court to see the best evidence of this.

THE COURT: What line does your brief reference?

MR. RUSSONIELLO: It didn't reference a line.

THE COURT: But page 150?

MR. RUSSONIELLO: Page 150.

THE COURT: Well, line 10 says: Mr. Biggs, did you identify when you testified before in the grand jury who indicated from the corporate office that the Ferritin

had to be added to the Lab Scan? I draw your attention to page 36, line 6, 216. The answer was: Okay, that was with regard to a discussion I had, as I mentioned prior, with the management group, in which Bill Thurston was there, and Bill had mentioned the fact that Ferritin was, you know, a test that we would add to the profile. My assumption based on that was that this was a corporate decision, which I didn't object to because I thought it was wise to add the Ferritin to the Lab Scan.

So the implications of that are what, that while Mr. Thurston may have mentioned it or announced it, he wasn't giving instructions?

MR. RUSSONIELLO: Absolutely not. And it wouldn't have been an instruction given to the sales [101] manager, in any case. As the court has indicated, Mr. Wilson –

THE COURT: Biggs is the sales manager?

MR. RUSSONIELLO: Biggs is the sales manager. And Brian Wilson – Bruce Wilson – Brian Wilson is one of the Beach Boys.

THE COURT: You're showing your age.

MR. RUSSONIELLO: Both of us are.

THE COURT: And this is no day at the beach. Ms. Winkler doesn't know what we're talking about; she's too young.

MR. RUSSONIELLO: It would be injudicious to say, maybe not. But in any case, we've quoted at length here about Mr. Bruce Wilson and his role and his recollection.

As the court indicated, it had already sort of found these references.

THE COURT: Let's see, Bruce Wilson said –

MR. RUSSONIELLO: Right, he was the general manager at Phoenix, and this is at page 15 of our reply brief.

THE COURT: Just a second.

(Short pause.)

THE COURT: At the trial appendix 87 to 88 – sorry, trial appendix 615 to 617, Wilson testified that the decision to add the test was made at the local level [102] and was an iterative process involving a variety of people, including the Phoenix technical director and others.

MR. RUSSONIELLO: And just as significant is the fact that Mr. Thurston did testify with regard to Wilson, who at the end of the Park City meeting, which was in January of 1988, Wilson said, I don't need the option to add Ferritin; I can make my budget without adding Ferritin. And it wasn't until September of 1988 that Wilson sends Mr. Thurston a memo, which we have excerpted here in our submission that is trial appendix 953, setting forth his plan. This is Wilson's plan to add Ferritin and why he's adding it. "In addition to offering more medically sound and beneficial procedures, this will give us a marketing edge over our competition. This will renew interest in existing profiles and force greater contact with existing clients, as well as potential new ones."

THE COURT: Let me see if I understand this. So the implication of this memo and Wilson's testimony

are that there was no instruction in January 1988 from Mr. Thurston to add Ferritin. There may have been some discussion, but it was local option. Mr. Wilson on behalf of Phoenix did not add Ferritin until September. And then based on his independent decision, not on an [103] instruction from Mr. Thurston, he said, we're going to add Ferritin?

MR. RUSSONIELLO: Right, corroborating that it is a local decision.

That's all I have to say on T2 and its claimed references.

Prepared to move to T3 unless you'd like to hear from the government first.

THE COURT: Did Ms. Winkler address T3 already?

MR. RUSSONIELLO: Yes, she did this morning, yes. I thought you had.

THE COURT: I think you're ahead of her.

Is there anything you'd like to say briefly, Ms. Winkler, further about T2, or should we move to T3?

MS. WINKLER: The only brief thing I would say is it does not solely relate to the Park City meeting, but two of the sections relate to – there is no time limitation. It's your testimony it wasn't your plan and it wasn't your idea; it was a local plan. And there's a distinction between when he's talking about Park City and then talking (sic).

THE COURT: I'll have to look at the particular statements again with care. There's actually a third option in my conception. You know, it might have not been a local

plan, but it might have been a corporate [104] plan and not something that Mr. Thurston had primary responsibility for deciding or instructing on. But I'll look at it.

MS. WINKLER: Although he also says it wasn't a national plan in one of the excerpts that's in T2.

With regard to T3 –

THE COURT: How do you deal – how do you respond to the last point with regard to Mr. Wilson? I mean, was Mr. Wilson at the Park City meeting?

MS. WINKLER: I think so. It's my memory that he testified that way.

THE COURT: Okay. And he's the representative of the Phoenix lab?

MS. WINKLER: Of the Phoenix laboratory. And there is –

THE COURT: And if he was instructed by Mr. Thurston, how did he get away with not adding Ferritin until September?

MS. WINKLER: The testimony on Phoenix was that they were making their numbers in March when they had the P2 meetings, and he didn't have to add it. He was the only one who didn't. The other three had to add it. He doesn't add it until the third quarter – or September-October, fourth quarter – and the reason being that's when – and that's why – that's the meeting that [105] Biggs testifies about where Thurston was there and says he said it.

Now, granted, it doesn't use the word "instruct." He doesn't say that. But even the citation to page 150 that the

defendant relies on says the same thing, that Thurston was there. It was Thurston who said the Ferritin would be added. That is in contradiction of what Wilson says. Wilson said something different.

With regard to T3 –

THE COURT: Just one second. You say Wilson said something different. What did Wilson say that was different?

MS. WINKLER: Wilson – I believe the defendant has accurately characterized his testimony. He said it was that he was the one who forwarded that memo.

THE COURT: Was Wilson an immunized witness?

MS. WINKLER: Yes, he was.

THE COURT: You haven't prosecuted him for perjury, have you?

MS. WINKLER: We have not.

THE COURT: Well, how come? I mean, you've got an immunized witness. He says it was a local decision. You say that was false.

MS. WINKLER: We have not gone there with any of the witnesses at this trial, your Honor.

[106] THE COURT: I mean, what Mr. Isola said – I think Judge Harrington said that Isola's testimony was not unfavorable to Mr. Thurston, if I remember it right.

MS. WINKLER: Generally. And, generally, this is from memory – I'll have to look at the specific cites –

but, generally, he confirmed Mr. Thurston's view that it was a local decision.

THE COURT: And you haven't prosecuted him for perjury?

MS. WINKLER: No, we have not.

THE COURT: Looks like Mr. Isola won the lottery.

MS. WINKLER: A ticket was made available to all four defendants, your Honor.

THE COURT: No, the point you're making is that the difference between Thurston and Isola is that Thurston testified falsely at trial, not that he went to trial.

MS. WINKLER: He testified falsely in his own defense at trial.

THE COURT: So Isola gave the same testimony.

MS. WINKLER: I haven't examined Isola's testimony to look to see if we can prosecute him or not. I don't know. And, as I said, I'm doing this from memory. My memory is that he testified fairly [107] consistently with what Mr. Thurston said.

THE COURT: But my memory from what I've read, but if it's wrong, I'm saying it so you can tell me Judge Harrington was talking about somebody else. I thought that Judge Harrington said that Isola did not testify unfavorably to Mr. Thurston.

MS. WINKLER: Correct.

THE COURT: So, essentially, they gave –

MS. WINKLER: Consistent.

THE COURT: – consistent testimony. So this –

MR. RUSSONIELLO: I think we can clear up what Mr. Isola testified to, your Honor.

THE COURT: Hold on a second.

(Short pause.)

THE COURT: What I'm trying to get at is, as I said this morning, is there a principal distinction? Now, whatever Mr. Thurston's motive might be inferred to be, motive is not an element in a perjury case. So if I've got, you've got Isola saying the same thing that Thurston said, then Isola's guilty plea – was he immunized when he testified at trial?

MS. WINKLER: He was not.

THE COURT: He wasn't?

MS. WINKLER: No, he was not.

THE COURT: Had he already been sentenced?

[108] MS. WINKLER: Yes, he had.

THE COURT: So he didn't have a Fifth Amendment right anymore not to testify because his sentencing was pending.

MS. WINKLER: (Nodding.)

THE COURT: But he took the same oath that Mr. Thurston took.

MS. WINKLER: He did that.

THE COURT: Okay. You want to go to T3?

MS. WINKLER: Yes. T3 is Mr. Bryant and, on page 78, which is at the bottom, S at 139.

THE COURT: Hold on just one second.

(Short pause.)

THE COURT: T3 relates –

MS. WINKLER: This is the choice argument, the instruction not to offer choice. And this is at page 78, the first mark, start at line 10: Did you at any time instruct Mr. Bryant or anyone else, for that matter, at Newbury Park that they were not –

THE COURT: You're going to have to go more slowly and clearly. Say that again.

MS. WINKLER: Did you at any time instruct Mr. Bryant or anyone else, for that matter, at Newbury Park that they were not to promote the fact that Ferritin could be ordered as a stand-alone test? Answer: No. [109] Question: Or that they were not to promote the idea that Lab Scan could be ordered without Ferritin? Answer: I did not promote that. Question: Or that they should not advertise that Ferritin could be offered as a separate test? Answer: I did not note that either. Question: Well, did you ever direct or instruct Mr. Bryant or anyone else that Damon should not advertise that the Lab Scan could be ordered without the Ferritin? Answer: No, that would be contrary to Damon's policies.

Your Honor, the next two pages are a very sort of lengthy set of questions back and forth, and I believe they both deal with a lack – they deal with lack of choice of different laboratories. The answer that's important is at the bottom of page 53 that says, it was an option that

those general managers chose to do, which goes to the issue that it's the general managers deciding whether or not to offer choice and not to – an instruction that came from him.

And then if we turn to behind the references section, this is Mr. Bryant's testimony at S at 007. It's page 33 of the November 27 testimony. And the question is: And do you recall any discussions with Mr. Thurston regarding whether or not to advertise that fact to doctors? Answer: I had a discussion with Mr. Thurston at some point during that time frame in which we [110] talked about the introduction of this profile, and the direction that was given to me was that we would not promote the panel could be ordered without the lab – without the Ferritin included. That if doctors requested to have that done, we would provide them with direction on how to do that, but it would not be generally advertised.

And then the next –

THE COURT: Sorry, who is speaking?

MS. WINKLER: This is Jim Bryant, and he is an immunized witness, and he is also the witness that the defendant points out that Judge Harrington had some things to say about, particularly at the Rule 29 argument.

And then on page 82, which is the next page. It's still Mr. Bryant speaking.

THE COURT: Hold on just one second.

(Short pause.)

THE COURT: The allegedly perjurious statement was whether he instructed Mr. Bryant and, I guess,

also whether it was a local option. And, here, Mr. Bryant is saying he had a discussion.

MS. WINKLER: And the direction that was given to me was that we would not promote.

And the next page makes it even clearer. Again, [111] it's Mr. Bryant speaking. Question: Was it your idea, Mr. Bryant, to add Ferritin to the Lab Scan at no charge to the doctors? Answer: No. Question: Was it your idea to not advertise to the doctors that they could order the Lab Scan without Ferritin? Answer: No. Question: Whose idea was that? Answer: It was the direction I received from Bill Thurston. Question: Did you agree with that direction? Answer: I did not agree with not advertising or making it easy for doctors to order without the Ferritin. Question: Did you do it, though? Answer: I did what I was told.

THE COURT: Okay.

MS. WINKLER: Now, the next excerpt from day 4 of November 29, 2001 at page 15 is showing Moran, who is the sales manager at Newbury Park. And this is offered as corroborative. It is not explicit, the way Mr. Bryant's is. At line 12, they're asking about what she recalls, and the subject being discussed is ordering Lab Scan without Ferritin. Answer: I believe that there was controversy whether or not to give the physicians the option to order the Lab Scan or the dimension reflex without the Ferritin test. Question: What do you remember being said and by whom? Answer: Discussions would have been with Jim Bryant, Doctor Moyer (sic), and Bill Thurston as to whether or not we wanted to give [112] those physicians the option, and the decision was made that they really didn't want to give the physicians the option to order the Ferritin. They wanted them to order it routinely.

Then the next excerpt that's provided, the next page at 115 is Nino Antonacci (sic) speaking, and it is my memory he was a billing manager, which I believe is correct. And, again, this is offered simply for the fact that – corroborative of Mr. Thurston being involved in the discussion. It does not confirm specifically the direction that Mr. Bryant discussed.

At line 3, question: How could you lose a doctor client if you didn't give a choice? Answer: Let's say you tried to, for lack of better words, your Honor, shove that test down their throat, doctors could be very sensitive to that and say, I don't want to do business with your laboratory; I'll do business with Smith Klein (sic). Question: So, instead, it was where you were just going to give the doctor the test for free? Answer: We would give the doctor the test for free, yes. Question: And what was the reason you wanted to do that? Because Beno Kon wanted to get that, and I think it was a corporation decision that they wanted to get that test out in the marketplace to see if there was an advantage to having that particular test.

[113] And for whatever reason that's included there, your Honor, it's not relevant to this issue and is misplaced in this particular –

THE COURT: How does this –

MS. WINKLER: It doesn't.

THE COURT: No, how does 116 corroborate that Mr. Thurston gave –

MS. WINKLER: It's in here by mistake. It's the next page I want. I'm sorry.

THE COURT: Actually, maybe it's in there because you recognized – giving the exculpatory part of it too, and then you can argue why I shouldn't focus on this. But doesn't this seem to say that Beno Kon wanted it, not Mr. Thurston?

MS. WINKLER: Beno Kon wanted the test out in the market – it says here – the discussion here is about giving it to them for free. But the next page is on choice, and it's out of order. It's page 115 and at line 14: At this meeting that you attended with Mr. Thurston and Mr. Kon and others, was there any discussion about whether or not the doctors should have a choice to get the Lab Scan without Ferritin? Answer – and this is what you were referring to, I think, your Honor: My recollection is that Beno Kon did not really want to give a choice to the doctors. He wanted the Ferritin to be [114] billed out, okay. And he's the gentleman I can recall vividly explaining that there was no other individual at that meeting. However, the sales, for purposes of sales, discussions did take place that you had to offer it in two different ways, whether the doctor wanted it or not, because you could possibly lose the doctor population out there – and if you back up, page 116 – because of the competitive market we were involved in –

THE COURT: I don't have 116.

MS. WINKLER: It's actually sitting right in front of it. They're out of order. That's the problem. And we gave you the whole testimony there so you could see the context.

With regard to choice, your Honor, the government's position is that when he denied telling Mr. Bryant not to offer choice that he did it – that Mr. Bryant's testimony was believed by the jury. It was material because it went

to the conspiracy and the tricking or deceiving of doctors and that it was willful. And you can look to the general denials as evidence of that mens rea in connection with that testimony.

THE COURT: But isn't the heart of your argument that the perjurious statement is that first one on page 78 of Mr. Thurston's testimony, S139: Did you at any time instruct Mr. Bryant or anybody else that they were [115] not to promote the fact that Ferritin could be ordered as a stand-alone test?

MS. WINKLER: Yes, your Honor. These are all just the same way of asking that question multiple times on page 78.

THE COURT: Then this testimony on 115 to 116, you're going to be told, I think, in a moment, shows that Mr. Thurston knew about this, maybe, but that it was Mr. Kon who was giving the instructions, not Mr. Thurston.

MS. WINKLER: The fact that there was a meeting where Mr. Kon was advocating a particular position doesn't – doesn't affect the fact that Mr. Bryant and Mr. Thurston had a conversation. But what it does is corroborate that there is a corporate, if you will. And whether Mr. Thurston came up with the idea or whether he just conveyed it to Mr. Bryant, there is a push not to give choice to doctors.

THE COURT: Okay.

MR. RUSSONIELLO: Well, Bryant, since he seems to be the key player here on this T3, the specific allegation is that Mr. Thurston told Bryant not to promote Ferritin alone and, presumably, not to advertise that it

was available alone, not to offer a choice. And I would refer the court to the general thoughts. Bryant was a charged – he was a conspirator. Footnote 5 of our [116] reply memorandum identifies the other persons who were identified by the government before the trial began as the unnamed conspirators. Bryant is one of those. Bryant is the person that, as we've noted before, the trial court had a chance to observe him, his demeanor and to hear his testimony, found to be the least credible of all the people who testified. It is not true that the jury both had to believe Bryant in order to convict Mr. Thurston. They could have believed that Bryant was lying, that he was a conspirator who basically had set this thing up and that, for other attenuated reasons sufficient under our federal conspiracy laws to ensnare just about anyone, the –

THE COURT: You used to be a prosecutor?

MR. RUSSONIELLO: Of course.

THE COURT: You didn't think it was ensnarement then.

MR. RUSSONIELLO: Ensnarement in the good sense. I only used it in the benign sense when I used it. But, certainly, the idea that there's necessarily a connection here between the conspiracy conviction and the Bryant testimony and the Thurston testimony is really a quantum leap.

THE COURT: Well, particularly, I've got to hone in. The earlier statement about – the earlier testimony [117] about instruction, now I've got instruction again. In my concept, Mr. Thurston could properly have been found to be a coconspirator even if he didn't instruct anybody, if

he agreed, but was not the person making the decision or communicating the instructions.

MR. RUSSONIELLO: Well, we spent two pages of our reply memorandum specifically on Mr. Bryant's testimony, even excerpting some of the record at pages 25 and 26.

THE COURT: Pages 25 –

MR. RUSSONIELLO: 25 to 26 to give the court some flavor of what kind of a person, witness Bryant was and especially on cross-examination.

And it's – and just to – not to highlight what I've already said there, let's just take what the government says is the critical evidence that they have found that they think evidences Mr. Thurston's dissembling here and his perjurious testimony.

Moran, Shelley Moran said that there had been discussions with Moyer, with Bryant, with Mr. Thurston and decisions followed. But it was Antonacci who was in those meetings as well who said that it was Beno Kon who wanted to offer Ferritin without choice and that it was Moran who said, you can't do this; we'll lose customers.

Now, this is in the page of the record here. [118] Reference is under tab 3. Antonacci, the part that perhaps by Freudian slip the government has included, page 116, that we would not have seen, I guess, from the government, beginning at line 12: And what was the reason the you wanted to do that? What was the that? Question at line 9. So, instead, it was where you were just going to give the doctor the test for free. Line 11. Answer: We would give the doctor the test for free, yes. Question: And what was the reason that you wanted to do that? Answer: Because

Beno Kon wanted to get that. I think it was a corporate decision that they wanted to get that test out in the marketplace to see if there was an advantage to having that particular test.

To 115, again, still Mr. Antonacci, his earlier testimony, beginning at line 14: And this meeting that you attended with Mr. Thurston and Mr. Kon and others, was there any discussion about whether or not the doctors should have a choice to get the Lab Scan without a Ferritin? Answer: My recollection is that Beno Kon did not really want to give a choice to the doctors. And then he goes on to talk through the rest of that page and, presumably, for some period after that about the fact that it was the salespeople. Who are the salespeople? Shelly Moran. Shelly Moran who is the person that frankly acknowledged – we identified in our [119] reply brief at page 20 – that everybody at the meeting agreed that you had to have choice because of the potential competitive disadvantage of not offering the choice.

If Bryant is the person that we are to rely on for establishing that Bill Thurston lied, I submit that the evidence is stronger that Bryant lied than that Thurston lied. Because whereas Mr. Thurston may have had some, you know, vague recollection as to some specifics and was careful, you know, that he always tried to sort of explain what it was that was his involvement in these various things, Mr. Bryant had no such hesitation. And what do we know from – in addition to what the government has offered here? Who was it that was found out that was actually offering the Ferritin without charge to the doctors in violation of the company's policy? It was Bryant who got chewed out by Isola. It wasn't Thurston. This is one of the things that the government had early on said was this

whole idea of offering Ferritin free to the doctors was kind of an inducement to them and that the denial by Mr. Thurston that there was such a program was further evidence of this, of his perjury. It was Bryant who was the one who was found out, and it was Isola who called him on the carpet for it.

[120] Just so that we complete our submission here, the court asked about Mr. Isola's testimony about the policy of local option versus national policy. And the testimony by Mr. Joseph Isola on December 5, 2001 –

THE COURT: Let me get the transcript, please.

MR. RUSSONIELLO: Yes.

(Short pause.)

THE COURT: What page?

MR. RUSSONIELLO: Putting it into context that it was the Park City meeting would begin at page 89, line 13, the questions by Mr. Loucks, through page 90, line 12.

THE COURT: Okay, he says that we left it up to individual laboratories.

MR. RUSSONIELLO: That's right. And specifically beginning at line 7 on page 90: We discussed as a group addition, the possible addition of a test to profile. Ferritin was the ones talked about and decided on, and we left it up to the individual laboratories if and when they would add it, based on the market, specific market conditions, specific conditions of the laboratory, and that's what occurred.

Was Bryant at the meeting? Yes, he was. Was Mr. Wilson at the meeting? Yes. Ending at line 16.

THE COURT: Okay. Thank you.

[121] I think that gives me what I need and what I need to think about on whether the perjury has been proven, even by a preponderance of the evidence.

And are there three issues you focused me on or two?

MS. WINKLER: Your Honor, I focused you on two. The one I left out was the denial of concealment of price differential. The reason was when we went back and looked at the statements as against the evidence, some of the defendant's arguments, frankly, were persuasive. And the best evidence we thought of the lies is what is included at T1, but we did not give defendant's notice of that, and you've already indicated that's off the table. But that's where it was, and we cited to the wrong place.

THE COURT: I'm sorry.

MS. WINKLER: If you want some preponderance cases, I've got some.

THE COURT: Okay.

MS. WINKLER: And from 1991, it says for perjury. It's preponderance on the sentencing issues.

Do you want just the – one of them is 944 F 2nd.

THE COURT: Are these First Circuit cases?

MS. WINKLER: First Circuit, all of them. United States versus Rojo Alverez (sic), 944 2F 959 at [122] 968.

THE COURT: What year?

MS. WINKLER: '91. United States versus Rehall, First Circuit, '91, 940 F 2nd 1 at 6. And United States versus Morindo (sic), First Circuit, '91, 936 F 2nd 23 at 30. And two of them discuss the application of note 1 to 3C1.1 so that they're right on point.

THE COURT: Okay. That was my understanding.

I'm going to have to think about this. So you're going to have to make some alternative arguments.

We're going to take a break in a minute, and then we're going to go into the last lap for today.

What needs to occur, I think, is I need at some point, and I'm inclined to do it soon, to give Mr. Thurston an opportunity to speak if he wants to speak. I actually didn't say this this morning. It's not always impossible to get a two level reduction for acceptance of responsibility, and now that I'm doing the resentencing, maybe that ought to be regarded as something that can be properly considered again. You know, there are people who go to trial and then later admit they committed a crime and say sufficient things to urge acceptance of responsibility. That may not prove to be this case, but I think it would probably be prudent – everything else deals with a historic fact like what was the intended [123] loss? But acceptance of responsibility is relevant to what kind of sentence is necessary for the man who is before me today.

So the issue may be moot. I may not hear anything that would be sufficient. But just thinking out loud, while I said the previously decided issues in my mind are closed,

I mean, I'm not reconsidering them, acceptance of responsibility might be an exception.

And the corollary of that is sometimes defendants say something that influences me to think they need a longer sentence than I might otherwise have given them. So anything that gets said is not without risk.

MR. RUSSONIELLO: May I ask the court a question?

THE COURT: Sure.

MR. RUSSONIELLO: Have you heard all that you need to hear on the disparity issue and on the downward departure?

THE COURT: No, this is what – no, not at all. That's why I'm saying this. No, I haven't. I don't think you've addressed it yet. Because then I think you need to make arguments to me on alternative hypothetical theories. One, if there's no perjury proven, what should the sentence be? And, two, if I find that perjury has been proven probably by a preponderance of the evidence, [124] what should the sentence be? And then maybe I'd listen to you for a little while on this Martin Carpenter point, which I still haven't had a chance to look at.

I mean, am I the person who decides what credit is given and, if so, how should I count the three months in home confinement?

But do you think there are other issues that you haven't had an adequate opportunity to address?

MR. RUSSONIELLO: Just we mentioned outside the court but on the record about the fine, and there is an issue, I think.

THE COURT: You can address the fine.

Do you know whether Mr. Thurston is going to want to say something?

MR. RUSSONIELLO: We've discussed it. I don't want to either poison the pool or to, you know, sort of ice it over. But the court has had a very short history with this case. We've been with this for a very long time. And one of the things that I've tried to convey at every opportunity is that throughout, given the remarkable, you might say, sea change that occurred with the National Health Lab indictment coming down in December of 1992, there were a lot of things that were done in the industry prior to December of 1992 in terms of how laboratories operated, what they considered were [125] within, not safe harbor, but at least were within the parameters of legitimate and reasonable understanding and application of regulations that were often very complex, what they did in terms of – and what their competition was doing and to what extent that drove it and all of the other things, which are not alibis for criminal activity, but – and when you talk about seriousness of the offense, this concept, how serious, how damnable health care fraud is in the country has to be somewhat tempered by what the regulatory environment kind of permit it.

THE COURT: I'm going to give you a chance to address all this. I guess I still don't know if Mr. Thurston wants to speak, but he doesn't have to, and you don't have to tell me now. We're going to take about a ten-minute break, and I think I'll offer him the opportunity to allocute

if he wants to when I come back. You can also argue to me the good works. I've had a lot to try to get into, and I'm not sure – I know I haven't read every letter or whatever. So you can talk about that. But when I come back, I'll ask him if there's anything he'd like to say. Because in contrast to Judge Harrington and in contrast to the way this usually would work, I didn't see him testify. I haven't got a feel for him as a result of having tried his case. And this all can get lost in what appears to be technicality, but [126] we're dealing with an important public interest and with a human being who has other human beings depending on him. I don't think we should leave here today without that other dimension coming through to the extent you want to present it.

We'll take about a ten-minute break.

Court is in recess.

(Short break.)

THE CLERK: Court is back in session. You may be seated.

THE COURT: Mr. Russniello [sic], would Mr. Thurston like to say anything?

MR. RUSSONIELLO: He would, your Honor.

THE COURT: And, Mr. Thurston, just so you understand, you have a right to speak before I decide what sentence to impose in this resentencing. You don't have an obligation to speak, though, and that means if you don't want to say anything, you don't have to, but if you'd like to say something, this is the time.

Would you, indeed, like to address me?

THE DEFENDANT: I would.

THE COURT: You may.

THE DEFENDANT: Thank you.

First of all, I would like to express appreciation to the court for the time, and specifically [127] to my family who is here, my sisters and brother and sons as well. Appreciative of their support.

I would like to address just a couple of things.

First of all, since we've spent a lot of time on the perjury question today –

THE COURT: Why don't you pull that a little closer to you, please.

THE DEFENDANT: Since we spent a lot of time on the perjury question today, I'd like to explain my inner feelings relative to that. I believe, and I don't mean to toot my own horn because I don't do that most of the time, but I believe that I have a reputation for honesty and integrity that I've had throughout my adult life. These perjury issues have been hard for me to deal with because it is hard when your integrity is challenged and you've had a life of trying to do otherwise.

As I look back upon those events in 1988, I can see that things could or should have been done differently. It's a bit, though, like playing Monday morning quarterback. You try to do what's right, and sometimes you can look back and say it wasn't. I always tried to do what was right. And so if I didn't, it was not an outward knowingly preplanned advance mistake.

I have always accepted responsibility for the things that I did, for the documents that I signed, for [128] the things that I said, for the way in which I carried out my responsibilities. And so for whatever responsibility I have for mistakes which may have been made, although at the time I didn't feel inside they were wrong, I accept that responsibility, and I'm certainly willing to pay whatever price is required. But I must say that if I had – if I were to say to you, hey, I made a mistake and I knew all along and now I'm finding it coming true, I would be violating the very principles on which – upon which I have tried to live my life.

THE COURT: Because that wouldn't be honest?

THE DEFENDANT: Yeah, it would be evil by saying it. And this is the very reason why I didn't accept the plea agreement is that I said to myself, what would my family say if I admitted to something that – in order to get off, so to speak, what would the people that I work with say? They would say, well, he isn't the guy we thought he was. And so I just said, you know, we've got to do the right thing. We've got to go through it and see how it comes out. I still feel that same way. And no matter what happens, at least I'll be able to say I was consistent. I kept the faith, so to speak, of the beliefs that I have. And I'll suffer what consequences are required of me for that, knowing that in the eternal perspective of things, there is an Almighty who knows, [129] and He will ultimately be the final judge.

Thank you.

THE COURT: That actually prompts a question that I was wondering about in connection with the appeal.

There's a footnote in the defendant's – one of the defendant's memoranda about the definition of willfulness that Judge Harrington gave the jury, implying to say that it had to be a violation of a known legal duty. Sometimes – usually when I instruct on willfulness, I instruct that it has to be a violation of the law, and the defendant had to know what he was doing was illegal.

But did you appeal that issue?

MR. RUSSONIELLO: Well, one of the serious problems that we had, as you may know, is that we didn't know what the jury instructions were going to be until after they were given.

THE COURT: You didn't?

MR. RUSSONIELLO: No. We flew blind – not totally blind, but our expectation of what we would be – what we would be hearing as instruction to the jury wasn't quite what we heard.

This case was tried in December of 2001. This was tried, you know, three months, within three months of 9-11. There was a, you know, totally, totally different [130] atmosphere here in Boston, I think, than there is now. You only had to go to a couple of the wakes and so on of some of the flight crews to fully appreciate that and people from TJ Maxx and so on. Not to say that anybody, no matter what they were charged with would have been convicted, but it was when there were armed Marshals patrolling the first floor of the building carrying automatic weapons. It gave you a little different feeling about the justice system. It was a very different environment. And I thought that we really had – that we had gotten a fair shake in terms of the trial. We were allowed to put on all the evidence that

we had and all of the rest of that and was probably as astounded as others at the result. But there were a lot of things in hindsight that we would look at differently.

But in terms – we've been with the case for so long, even though we didn't represent Mr. Thurston, that we had pretty good instincts about what was going to be important, what we thought would be important and what wouldn't.

THE COURT: On the appeal?

MR. RUSSONIELLO: On the appeal.

THE COURT: I'm not faulting you or suggesting – at all suggesting there was any ineffectiveness. I mean, you're representing Mr. Thurston very [131] energetically, very effectively. The submissions that you've made in a short period of time have been excellent. And the government's submissions have been very good too.

All right. Because the comments he just made go right to the heart of that legal issue. Various times I've wrestled with what willfulness means because some crimes you commit if you act knowingly, intentionally, not by accident or mistake, and others you have to act knowingly and willfully. So I always thought willfully was something more than I intentionally put the Ferritin in the Lab Scan; I also knew it violated the law.

MR. BROWN: If I could just address this, we may be a little bit closer to that legal issue. I may have even written that footnote that you're talking about.

THE COURT: If you came here more often, you'd know I read the footnotes. Go ahead.

MR. BROWN: That is not an instruction that we did get, but what I think you're referring to is this line of cases that say that in complex areas of the law, such as Medicare, that willfulness includes the idea that you have to be violating a knowing legal duty. And that is something that we asked for. We didn't get. Didn't address that specifically on appeal. But I do think that, nonetheless, that that concept can be taken into [132] account in the sentencing process. It's not as though that concept is –

THE COURT: I think the only way I can conceivably take it into account, and I'll have to think it through, is on the question of whether I would give Mr. Thurston a reduction for acceptance of responsibility. And the reason I would resist – one of the things I have to think through – he's got a right to allocute. He's not subject to cross-examination when he does. But if it's a disputed material fact on anything other than acceptance of responsibility, ordinarily, the government would have a chance to cross-examine him. But I was just curious because, actually, Mr. Thurston said some things that were consistent with what I was gleaning from the papers, but it's much better to hear him, although it's not the only thing to be considered at a sentencing. But he told me what I had discerned, probably because it was written expressly, that he declined the plea deal because he really didn't believe he had committed a crime. He cared about his reputation. And sometimes people make mistakes, and sometimes those mistakes are found to be crimes. But we render the best human judgments we can render, and certain people believe deeply that's not the ultimate judgment. So we do it with humility. But we've got to live in a society where [133] somebody judges.

MS. WINKLER: May I be heard briefly?

THE COURT: Yes.

MS. WINKLER: Your Honor, Judge Harrington gave a – in his instructions, a definition of willfulness that was to say the bad purpose either to disobey or disregard the law and not to act by ignorance, accident, or mistake. That's on page 23 of day 16. He also gave a very strong good faith instruction that went on at some length about we hadn't proven willfulness or whether the defendant acted in good faith. They had to consider all the evidence, and the defendant didn't have to prove that at all. And he pointed out that the defendant had offered evidence of his good general reputation for honesty, veracity, and integrity, and that that could raise a reasonable doubt in his mind.

THE COURT: Because good faith would be a defense on the willfulness.

MS. WINKLER: Absolutely. So he did all that. And the defendant did appeal the failure to give the Pridmore (sic) instruction for the more specific, what the specific regulations. And the First Circuit decided it.

THE COURT: I'll look again. I must have missed that. That's good.

[134] MS. WINKLER: It's at page 66. Well, it's at 67 where the First Circuit deals in their opinion with the definition of willfully and the fact that there was no prejudice from the failure to do the precharging conference. And they go on to explain the Pridmore piece at 65 where they explain this isn't about falsity, a false statement; this is about trickery, fraud, or deceit. And that's what the jury found.

THE COURT: As a practical matter, as I said, this hasn't been remanded for any consideration of whether there should be a new trial, so that's settled.

MR. BROWN: And I'm not arguing that. I just want to be absolutely painfully clear. We did appeal this so-called Pridmore instruction. What I was talking about was a different instruction. I think we've cited the Chief (sic) case and maybe the Raxlap (sic) case. But just to make sure the record is clear that I wasn't saying we didn't appeal something that we had in fact appealed.

THE COURT: I haven't made a final decision on the perjury matter so you do need to make alternative arguments. And I don't mean to get anybody's hopes too high or too low, but it may inform those arguments if I tell you that – I change my mind when I write or outline what I'm going to say. I have to test my tentative [135] thinking. But at the moment, I don't think I'm probably going to be persuaded that the government has proven perjury. So you've got to pay particular attention to what should I do in those circumstances. But if you come back tomorrow and I've changed my mind, I hope you don't feel sandbagged. I'm just trying to tell you where I am at the moment so you can address my present state of mind. But I need the alternative arguments.

So I guess I need to know what the government's recommending in the circumstances and the reasons for it.

MS. WINKLER: Your Honor, even without the perjury finding or the obstruction enhancement, the government's position is that a five-year sentence is reasonable in this case and that it's based – it would be even more reasonable if there was an obstruction enhancement but, if there wasn't one, we still believe that is

a reasonable sentence. And the reasons for it are as follows. And I'm going to just start with (a)(4) and (a)(5) under the 355 – 3553, because those are the Sentencing Guidelines and just to have a starting point.

Under 3553(a)(4), the Sentencing Guidelines, even without the calculation for obstruction, bring us to 63 to 78, and the Guideline sentence is therefore 60 months. And so that's the guidance that's provided by the Guidelines. In (a)(5) and the comments by the [136] Sentencing Commission, we think it's important that they have dealt with issues in the context of the national system with regard to charitable contributions and disparity. Even at that level, they make comments about it, although I realize that's different from (a)(6).

THE COURT: You know, on that – you probably can't get it. I have it. But I testified on the proposed Guidelines in 1986 and, actually, you know, urged that they maintain their determination to diminish disparity between white collar criminals and what you call blue collar criminals. And I've often said it in tax cases, for example, somebody didn't pay his taxes and then he gave a wing to the church, and everybody says he's a great fellow. That rarely moves me. As I say, we could all make bigger contributions and get our name on the building if we didn't pay our taxes.

Having said that, usually these are people that I perceive are slippery characters that are kindly in many areas of their life, and then they're sort of trying to purchase a good reputation with the money that he got illegally. But I don't have that sense of Mr. Thurston at all.

MS. WINKLER: And neither did Judge Harrington. And he also saw the contributions that Mr. Thurston

had made as very significant and committed over a course of [137] many years.

THE COURT: I suppose I'm asking you, though, because you've lived with Mr. Thurston a lot longer than me. Am I missing something?

MS. WINKLER: Your Honor, the only thing that I can say to that is that I think it's important to take into account the context and that at least one part of that context is the fact that there is a lot of means and ability, time and money, to reach out and help in a way other people can't. That doesn't get to the personal part that drives someone to do that. And I think in connection with that, the other context that's important is the crime. And however –

THE COURT: Let me just ask you this, and I'm going to let you address this fully, but – and I'll undoubtedly hear from defense counsel – but has Mr. Thurston, as far as you know, had a life-long commitment to doing these good works that go back to his early years, or is it something that's come about more recently or came about when he became more prosperous?

MS. WINKLER: Certainly the material that's been submitted by the defendants indicate a long period of time and at least back to the time period when this crime took place, which was fairly long ago at this point, '88 to '93. And while most of it seems to deal with from [138] then and forward, I have no indication that he was substantially different beforehand. I don't know the answer to that question.

But to go to the, sort of the other framework for it, I think it has to be compared to the crime and taking from a

vulnerable program. That as much good as you may do in one area of your life, when you've done something bad in another, you have to look at those two things that has the balance, and it goes to who and what, you know, a person is, even though, obviously, people can make amends over time. That's not what the Sentencing Guidelines were meant to do.

So our belief is that although certainly he has done many admirable things, that the nature of the crime and the nature of his ability because of who he was and what means he had mean that that should be taken into account in a limited fashion and balanced against on the other side the seriousness of the offense, the need for a general deterrence, which in this area, I think, is particularly important because we're dealing with rational people who make decisions on risks and rewards.

THE COURT: You've heard me say that at sentencing. I think the place that general deterrence works best is essentially in white collar crimes because these are rational people, not drug addicted people, and [139] they're making calculations as to their self-interest. But having said that, you go to what happened with regard to Mr. Isola.

MS. WINKLER: There is a disparity.

THE COURT: Not just that there's a disparity, but, one, you know, when you entered into that plea agreement, you were, in effect, saying to Judge Harrington that getting a conviction, among other things, adequately serves the interest of general deterrence because you're not supposed to enter into a plea agreement, and a judge is not supposed to accept a plea agreement that's inconsistent with the 3553(a) factors. And these things come together.

MS. WINKLER: I understand what your Honor is saying. The only distinction I would draw is that the government did not agree and does not agree that that sentence was adequate. We didn't agree to the sentence, and we did recognize that's what he was likely to do. And he had said it. He said he was likely to do probation. We went there.

THE COURT: But then you could – you had no presentence report, and you agreed not to appeal. Your option was you were going to have a trial anyway. If you're going to try the case, you might as well try it with two defendants. You get to the end of the case. If [140] you secured Mr. Isola's conviction, you would come in and say he should get 60 months. If Judge Harrington gave him – departed on him too, you could appeal, and you could have got 60 months on Mr. Isola.

MS. WINKLER: That was an option. We made a different choice based on what we believed the reality was at that time.

THE COURT: But the Guidelines are intended to get rid of unwarranted disparity, and there is – I mean, I've moved a lot on this in the past 18 years. I used to be the talking dog. I was out there telling judges, you know, we can make these work. But I now really do believe, and this case is a paradigm, that the Guidelines have shifted discretion that was previously exercised publicly by neutrals in the process, judges, to, secretly, to prosecutors who –

MS. WINKLER: We –

THE COURT: Let me finish so then you can address it. I'm not just saying this to make myself feel better. You know, who can say, you know, okay in this particular case, we won't say there's relevant conduct and, if the judge imposes an unlawful sentence, we won't appeal. How does –

MS. WINKLER: We made a hard choice, and I understand the argument you're making. But –

[141] THE COURT: I'm not making argument; I'm making observations.

MS. WINKLER: Well, observations.

THE COURT: I don't get to have that much fun anymore.

MS. WINKLER: The one thing we didn't do is do anything in secret. It was out in the open.

THE COURT: No, and, in fact – and I'm making this distinction. I'm not suggesting – you know, I'm not accusing you – I'm not accusing anybody of anything – but I'm not raising the question that Judge Young cited this case for. Now you sound justifiably like Mr. Thurston. You don't want to – you'll take responsibility for what you did, but you don't want it to be confused with something you didn't do.

I don't regard this as fact bargaining in the sense that – although, you know, there are things that are sins of crimes of commission and crimes of omission. You didn't come in and argue at the sentencing, there's relevant conduct here, judge. It's not just able. In fact, you went with an information.

On the other hand, I'm not saying that's always inappropriate, but when you've got codefendants, you know, the judge can. Now I'm going too long. Just to finish this. I didn't try the case. The judge who tried [142] the case abdicated his responsibility for that. He didn't resign. He just said he didn't want to do this case anymore. And so now I've got to do the best I can do with the case. But he sat there and said, Isola's the chief architect. He's more culpable than Mr. Thurston. There's no presentence report, but it would be surprising to me if Mr. Isola had the same record of good works that Mr. Thurston does. And I don't regard it as promoting respect for the law and the interest of the administration of justice to give a sentence that's going to send the message that the purposes of sentencing are served if you plead guilty and get no time but, if you go to trial, you get five years when you could have gone home, and the reason you didn't take it is, in your heart you, the jury says mistakenly, believe you didn't commit a crime.

You know, if somebody looks at this case – and a lot of people have talked about this case – and Mr. Thurston gets five years, I think it's going to greatly burden people's willingness to exercise their right to have a trial. And you look at the TAB Pharmaceutical decisions last year. The government doesn't win every case. Judge Woodlock determined after listening to all of that, as I understand it, there was no factual basis for the one guilty plea he took. You know, it's part of [143] what I'm wrestling with.

MS. WINKLER: Your Honor, there's no question, I think, at least in my mind, that the (a)(6) factor cuts against it, because there is a substantial disparity.

THE COURT: So why didn't you recommend a sentence to me that diminishes the disparity?

MS. WINKLER: Your Honor, between where the Sentencing Guidelines recommend this come out and the seriousness of the offense, we don't feel like we can recommend a sentence of less than five years, but certainly understand the argument or the observation that you make.

THE COURT: Well, why – other than punishing him for going to trial, why did you recommend a sentence of less than five years for Isola?

MS. WINKLER: We didn't recommend it.

THE COURT: Well, you say recommended. You acquiesced in it. No presentence report.

MS. WINKLER: We made a choice.

THE COURT: An information.

MS. WINKLER: Our belief was that Judge Harrington would likely do what he did in the Cullen case and what he did in half of this case and that, as between the two, the conviction was more important. That's a choice we made, and we made it openly.

[144] THE COURT: So should I interpret that to mean if you were before Judge Harrington you wouldn't be advocating five years in this case?

MS. WINKLER: No, we'd still be advocating five years.

(Short pause.)

THE COURT: Is there a reason that even if it wasn't your subjective motive that people would reasonably believe Mr. Thurston's getting five years because he went to trial, and there's no other real reason? Isola didn't plead guilty, he pled nolo, which you used to need the agreement of the Department of Justice in Washington to agree to, as I recall. And he gave the same testimony that you claim is perjurious to Mr. Thurston, although you perhaps didn't know what he would say when you made the deal.

MS. WINKLER: We did and do believe the testimony is perjurious. We did object to the nolo plea on office policy grounds, but did not appeal the fact that it was accepted anyway.

THE COURT: Wait a minute. How could you – who would you object to? He had no right to an information. You dropped a charge against him. Who did you object to?

MS. WINKLER: Well, we objected in the hearing.

THE COURT: With the judge?

[145] MS. WINKLER: Yes.

THE COURT: So why did you return the information? That's exclusively up to you.

MS. WINKLER: Well, we did return the information.

THE COURT: I know. That means you agreed. You agreed.

MS. WINKLER: Well, the information was filed, and he pled nolo to it, and we didn't – and we objected but didn't appeal it or –

THE COURT: Objected to what?

MS. WINKLER: The nolo plea.

THE COURT: The nolo plea, but not to the information.

MS. WINKLER: Not to the information, to the nolo plea.

THE COURT: Didn't you know he was going to plead nolo?

MS. WINKLER: Yes, we did.

THE COURT: So you agreed because, if you disagreed, you wouldn't have filed the information. You would have said, we're going to trial against Mr. Thurston anyway. The more the merrier. And we'll see what happens.

MS. WINKLER: I can't take this argument any [146] deeper, your Honor. That's what we did.

THE COURT: But you – this case is about deception, and Mr. Thurston is charged with deception. And I have the highest regard for you, and you've persuaded me to do things in other cases that are hard to do, like when the guy's 95-year old mother was sitting there, but I sent him away for the full time required by the Guidelines, because I don't think anybody should bring his 95-year old mother to court, among other things.

But to say you didn't agree is a misleading statement because that deal for Isola could not have gone down without the agreement of the Justice Department.

MS. WINKLER: We understood what was going to happen, and we let it happen. And is that an agreement? Yes, it is an agreement. We agreed as part of it we would object. We knew that the judge was going to take it anyway.

THE COURT: Part of the Guidelines are supposed to serve the purpose of truth in sentencing. That's why we got rid of probation (sic). It's not just that it should be truth in sentencing, it should be truth in judicial proceedings.

MS. WINKLER: Well, the only thing I can say, your Honor, is that the judge knew the facts. The judge [147] knew the loss. He indicated what he would do. We acquiesced. We let that happen. And we made the same offer that we would let happen to all four defendants. And your observation that that means in this case where this man goes to trial and we obtain a conviction beyond a reasonable doubt for a very serious offense, that there is an atmosphere of burdening that trial right, but that, I think, your Honor, has been – the fact that plea agreements can give much better deals and trials can result in very harsh consequences is – it has been decided, and it is unfortunate.

THE COURT: It's been decided that it's not unconstitutional.

MS. WINKLER: Correct. And under 3553 and that disparity factor, you can certainly take this into account. And all I think we can ask in counterbalance to

that is that the seriousness of the offense has to weigh with it.

THE COURT: Reasonableness is always determined in light of all the circumstances. But you offered him probation, and you must have thought it was reasonable at the time.

MS. WINKLER: At the time we believed that conviction was the – what we could most likely obtain in that session, given our history in that session. And we [148] needed the deterrent impact. And we thought the general deterrent impact was sufficiently important, and we made that choice.

THE COURT: And that it would be adequately served by a conviction with no time in prison.

MS. WINKLER: We didn't think it was right, but that under the circumstances of what we had to deal with is what we chose.

THE COURT: That it was sufficient in the circumstances?

MS. WINKLER: It was a choice, but we did not believe it was sufficient. It was just simply the best we thought we could do.

THE COURT: And the sentence Mr. Thurston got was six months, and he's served three of them in a halfway house and three in home confinement; do I understand that right?

MS. WINKLER: Actually, your Honor, I believe he got three months, and he got two years of supervised release, of which the first three months were in home

detention. So the effect of it was three months in prison, three months home detention.

THE COURT: I see.

(Short pause.)

THE COURT: Is there any more you'd like to say [149] at this point?

MS. WINKLER: No, your Honor.

THE COURT: Thank you.

MR. RUSSONIELLO: Your Honor, this is not the Department of Justice's finest hour in this case, and I do not enjoy standing before the court and sort of taking what I think are necessary shots at what the Department did, what the US Attorney's office did. We leave town, and our likelihood that we come back here and do any more business with the US Attorney's office of the District is – well, me, personally, probably pretty remote. But the court will be dealing with this office for the foreseeable future. My problem here is that or the most significant problem in looking at what the government did is that it's almost somewhat Kafkaesque here to suggest that there's been a significant difference in Mr. Thurston's position before this court than there was when he stood before Judge Harrington for sentencing. I mean, here you had the trial judge who asked many of the same questions that you're asking. Weren't you here with the person who was more culpable? Didn't you control the case by filing an information? Didn't you stand mute as I gave him a probationary sentence? Didn't you acquiesce in the nolo contendere plea? What is there except the fact that Mr. Thurston exercised his right to trial that [150] differentiates him and his level of culpability from Mr. Isola? Judge Harrington did not

immediately recuse himself from this case because he was sort of bored with it. He recused himself because the First Circuit said it was going to mandate the imposition of a five-year sentence that he thought was unconscionable, given that it sort of removed his discretion and, basically, upset his ability to do kind of what was right.

THE COURT: Well, prior to Booker, we took an oath to follow – still take an oath to follow the law as it's democratically made, and all of us have imposed sentences with which we felt uncomfortable because we believed in the morality of consent. Judge Harrington recused himself when the case wasn't even before him; it was on its way to the Supreme Court. If he had waited, you'd probably have the pleasure of talking to him instead of me. And one of the things I want to make clear, because it's one of the things I'm wrestling with, is the one thing I don't think I can or should do is punish the public. This is not a case of prosecutorial misconduct. I've had those cases. I hope I can say I had those cases. But the concept is – we're familiar with it – you don't punish the public if the prosecutor makes an error.

MR. RUSSONIELLO: We've been careful not to say [151] that.

THE COURT: I know. And me too. But it's really, you know, it's a really – I think we're on the right track. Go ahead.

MR. RUSSONIELLO: And I think we have the benefit here of unique backgrounds that sort of just give us a greater understanding of how the Sentencing Guidelines came into being and why so much responsibility was reposed on the prosecutors. I was part of the committee of the US Attorneys that met with the Sentencing Commission and,

obviously, it was almost by default, but it was default in the sense that we had the integrity of the Department of Justice with its mechanisms for checks and balances to ensure that there would be truth in charging and that there would be steps taken to ensure that the most serious charge was the basis for any disposition of a case. Fundamental. Hornbook (sic) law for us, in the manual. We would never waive a presentence report because it would conceal from the court or had the potential for concealing from the court critical information the court needed to make a reasonable sentence in the case, whether it was, you know, Guidelines or pre-Guidelines. We always wanted to be sure that what we were doing was the right thing, that it was a fair disposition of the case.

[152] Disparity in and of itself, you know, doesn't mean anything except unevenness. Unwarranted disparity means unfairness. And the government has not – the court may still have a question in its mind whether it's been persuaded that there is a justifiable disparity in this case. But now that we have exposed, you know, as openly as we can the pretext for the claimed perjury, what we're left with are the two other alleged grounds, which are, as we've discussed, a difference in the status of the two defendants, that one was more culpable than another, and that they were charged with different offenses.

THE COURT: And I'll help you a little bit because I'm not persuaded by either of those. First, they were charged with the same thing originally, weren't they?

MR. RUSSONIELLO: Isola was charged with more than Thurston was charged with.

THE COURT: More. And the only reason it looks like he was charged with less is that the government

exercised its discretion to dismiss the indictment against him and come back with an information. And I'm sure the government felt it had a good faith basis to include him in the original charges, and that means they believed they could have proved those even as relevant [153] conduct if they had to.

Ms. Winkler is shaking her head yes.

So the fact that the charges are different doesn't help the government.

What's the second one?

MR. RUSSONIELLO: Well, that they were – different culpability, that Thurston was more culpable than Isola.

THE COURT: Here's – Judge Harrington and I – he's the one who heard the case. And maybe if I tried the case for three weeks, I'd come to a different conclusion. But just as I feel you're stuck with his decisions on intended loss, I think just as the courts of appeal say, when you sit in a court, when you see people testify, when you know the whole gestalt of the case, and Judge Harrington has seen lots of cases, you know, you get a feel for it that's hard to get from a paper record. So I'm prepared to accept Judge Harrington's characterization that Mr. Isola was the prime architect and more culpable.

MR. RUSSONIELLO: And it's difficult for the government, really, to argue that these were corporate decisions, but that they were corporate decisions not made by the person who heads the corporation. I mean, if they're corporate, they're corporate down.

[154] THE COURT: I think I'd probably be specific to every corporation, and I don't think that somebody's most responsible just because he's the CEO. In fact, the CEO has got a lot of responsibilities and maybe circumstances where he's less responsible. He just hasn't been paying attention to that area of the business. But, apparently, that's not the judgment Judge Harrington came to. So the difference between Isola and Mr. Thurston is Mr. Thurston says with persuasive conviction to me that as a man of integrity he could not raise his hand and say he committed a crime when in his heart and mind he sincerely believed he didn't commit a crime.

Now, none of us are the arbitrators of our own actions, and the jury says he committed a crime. So he made a mistake. But that's – if I perceive this as a case where, you know, somebody said, well, you know, I'll roll the dice. I don't want to be convicted for whatever reason. I don't want to lose my ability to work in the health care industry. And he lost that gamble because he was hoping he, you know, would get away with it, I'd have a different view of the difficulty of the case. I'd say, too bad, you know, you took your chance, you lost, you're out of luck. But that's not where I am at the moment.

MR. RUSSONIELLO: I think the government put a value on the case at the time of the Isola disposition. [155] I mean, this was not something that was frivolous, I don't think. I mean, they had extracted significant amount of money from the corporate defendant and gotten the conviction and all the rest of it. And the fact is if they found themselves in a – you can call it a session or an environment in which they thought they might have some difficulties, as I've tried to explain, they probably were going to have some difficulties because there was a lot to

be worried about here in terms of what the evidence was, the novel theory of prosecution, some of the things that we know were remedied by HICVA (sic) after the fact, you know, this idea of requiring a doctor to actually give a CPT code every time in order to test so that everybody would be on notice that it had a specific relation to a diagnosis requiring that the certifications be for specific tests given, and on and on and on. All after the fact.

We're a lot smarter that Congress even enacted 1371 in 1976 because it felt that health care was in a much more serious problem –

THE COURT: If 1371 is important, you're going to have to tell me what it is. If you start talking about the RICO statute, we can talk shorthand. I don't know 1371.

MR. RUSSONIELLO: They made a specific Medicare [156] fraud. Instead of the usual kind of conspiracy to defraud the United States, a Klein conspiracy, or something like that, they made it a very specific – well, Congress wanted to show the world and the taxpayers that it was interested in caring about this.

But getting back to the Isola time period, with a judge who said, you know, no one is ever going to be punished for going to trial, and with the government saying, this is what we think is the value of the case, not just to you, Joe Isola; but to you, Jerry Cullen; to you, Bill Thurston; this is what we think the case is worth. That sort of set in – not in concrete so they could never pull away from it, because you asked for should there be a difference if you find that the defendant committed perjury in the trial? Absolutely. I mean, absolutely. The defendant has no right to expect that appearing at trial, exercising his right to trial means exercising his right to, you know, connive or dissemble or

fabricate or anything else of the sort. And as I think we've demonstrated pretty clearly here, that didn't happen.

But when you look at what it is that the government accomplished by the Isola plea, it says, well, we got the guilty plea. Well, as I mentioned briefly this morning, if all of these cases, all of these [157] sentences all go into this sort of grid and matrix for purposes of telling the rest of the judges throughout the country how cases – what the mean is and what the factors are and so on, there was no asterisk on the Isola plea and sentence, don't pay attention to this one because we thought we were going to have a tough time with the judge at trial, and that's why we took a cheap plea. Nothing like that. The government basically figured this is the best that we can get in this court, but it didn't change the fact that the other trials were going to be in that court, and the government should have expected, because they had an obligation to do justice, the government should have expected that barring something unforeseen at the trial, which didn't happen, that there would be a sentence imposed at the end of the process that would be the same as was going to be imposed at the beginning of the process except for some acceptance of responsibility modification, which is exactly what Judge Harrington did.

THE COURT: Well, the government also had the power to insist on global pleas, which sometimes are done. So if he was going to take in effect what was a downward departure for Isola and agreed to it, which the government did, the government could have said – this has happened in other cases, like my Ferrara case in [158] 1992, which is still out there (sic), you know, we want to save a long trial, everybody pleads, everybody will get a reasonable discount in his sentence. But if anybody is going to trial, everybody

is going to have to go to trial, because we're going to have to try the case. We're indifferent as to whether there's one, two, three, four of them sitting there.

MR. RUSSONIELLO: And even though it was one count, the fact is it was one monster count of conspiracy. So a defendant who kind of walked in and said, judge, I want to throw myself on the mercy of the court and plead guilty, really, wasn't in the same position that Mr. Isola was in, because you were confronted with the allegations in the indictment of X number millions of dollars in loss and so on and so forth, which no sentencing court would have been able to ignore on a simple plea, you know, to the one count indictment.

So the government basically created this environment with respect to this case, and as wrenching and as difficult it is for all of us to sort of say, well, now that we have it, what do we do with it? The question really is how do we ensure, you know, to an audience of our peers and to, you know, the community in general and so on that we're going to not distort the [159] process any further by imposing a mechanical sentence. This would be a mechanical sentence to take the 60 months –

THE COURT: Arguably – well, maybe 60 months – what sentence do you advocate?

MR. BROWN: I think the sentence imposed was the right sentence.

THE COURT: Why does that adequately represent the seriousness of the offense?

MR. RUSSONIELLO: Because the seriousness of the offense is judged by the government's contention that this was a crime that occurred over a period of five

years from 1988 to 1993, that it resulted in an intended loss of $5.8 million, and offsetting that is the notion that I said here you had the government basically saying, in December of '92, eight months before the end of this conspiracy, we're indicting this other company on this kind of conduct that most of the industry thought up until yesterday was probably legal.

THE COURT: I have trouble with that part of the argument because I don't have evidence in front of me that most of the industry thought it was legal. And that essentially goes to this good faith point. The government – it's hard, as you know, to prove anything beyond a reasonable doubt. And the government apparently [160] proved that there wasn't a good faith belief that this was lawful beyond a reasonable doubt.

MR. RUSSONIELLO: But there is evidence –

THE COURT: One of the things the government should learn from this is it shouldn't be too frightened to go to trial before any of us. You can go in. But when you indict a case, you should have to say, is this a case I'm willing and able to try? Is this a case not that I'm assured of winning but that I expect I'll win? That's a standard in the US Attorney's Manual. And then when the time comes, don't blink.

MR. RUSSONIELLO: We're talking about conduct that was 1988 to '93. The indictment was like four years after that in '97. Plenty of time to investigate it.

THE COURT: The indictment was '97. Was it tried in 2001?

MR. RUSSONIELLO: January '98. So there was plenty of time to figure out exactly what all is there and to put it together. I mean, this was an enormously intensely papered case. And I think, quite frankly, the government got a lot more out of it than it would have. I mean, National Health Labs, if National Health Labs had gone to trial on this theory, we may never have seen indictments in this case. Who knows? But the fact of the matter is the National Health Lab disposition was a [161] pretty cheap plea as well, all things considered. And the evidence in this case is that following the return of the indictment, Damon was careful. Damon corporate went out of its way to make sure that what had gotten national health labs in trouble wasn't going on in their shop, that all of the doctors were given notice, that there were options, that the requisition forms –

THE COURT: When was this?

MR. RUSSONIELLO: This was all between December of '92 and August of 1993.

THE COURT: The alleged indictment – the alleged conspiracy here ended when?

MR. RUSSONIELLO: August of '93. That's why I say in terms of seriousness of the offense, which is just what we're talking about, there are mitigating aspects of the seriousness of the offense. Medicare fraud by itself is a very serious offense. But in the context of this case, was this a case that involved conduct after 1996 after the requisitions were changed, the regulations were changed? No. Was it something that started up after Braniff's comment? No. This was all stuff that was sort of concurrent with the National Health Lab activities.

The reason that I argued for this sentence is sort of two-fold. When you look at the significant justifications for downward departure, the good works, [162] the special family situation, the aberrant conduct aspect, the over-statement –

THE COURT: Well, I don't think aberrant conduct as it's used – I'll say the following.

MR. RUSSONIELLO: The government says that the reason aberrant conduct doesn't apply here is because of the perjury at the trial.

THE COURT: No, aberrant conduct as a term of art, you know, the way it's used in the Guidelines in the First Circuit, which may be different than the Ninth Circuit – there was a time when it was – but now the advisory Guidelines are in effect – you know, it's sort of like a single impulsive thing, not something you do over a long period of time.

Was it out of character for Mr. Thurston to commit a crime? I'm inclined to say definitely yes. Was it aberrant conduct as the First Circuit decides it in Guideline terms for the purpose of departure analysis? I don't think so. Because it went on too long, and it does involve –

MR. RUSSONIELLO: One of the things that the First Circuit said to us in its first opinion, which it vacated and then replaced with another, was that the –

THE COURT: Sometimes I wish I could do that.

MR. RUSSONIELLO: Well, I think, to cover its [163] own embarrassment that it had suggested that a person who was a religious person really could never earn credit for good works, it was a hideous notion, and so they

withdrew it from their opinion and with good reason. But what they said about the character evidence was that, really, character evidence isn't really relevant under the mandatory Sentencing Guideline scheme, but it may have some relationship to aberrant behavior. And so I'm bringing this up because even though it may have been a protracted course of conduct, Damon did a lot of other things besides this.

THE COURT: I guess all I'm saying is – the point I'm making is a semantic one. I do think it's relevant afterwards, and I noted that footnote where they said a mandatory scheme, this isn't cognizable, but now we're an advisory scheme. So I definitely think there are places in which Mr. Thurston's good character comes into play, including on the deterrence issue on the need to protect the public.

The tension in this case at the moment is between unwarranted disparity between him and Mr. Isola and the seriousness of offense, usually, on one hand, and, you know, his exceptionally good character as demonstrated by his exceptionally good works and the disrespect for the law that I'm concerned would be [164] generated if there was this misperception that it's all up to the government and, if you make them do what they undertook to do when they charged you, which is conduct a trial, you're going to get five years instead of zip. That's not the way it's supposed to work under a Guideline system, because that gives the prosecutor the kind of discretion that judges used to have and which the Guidelines were intended to diminish if not destroy. That's the dilemma I have.

MR. RUSSONIELLO: And I do not – I for one do not want to see even the slightest diminution in the

prosecution's entitlement nor authority to sort of control the prosecution of cases. We should not go to some European system or anything else where we sort of delegate this to magistrates or masters. This is not a good idea. But in order to ensure that there is public confidence in that process, from time to time the court has to do what the prosecutors fail to do or won't do or can't do. It's like the eraser on the pencil in some respects. It's a heavy burden, but it's a consequence that in a case like this the government will take a lesson from and will obviously recover from. We're not asking for a defendant to be – at this juncture – for you to make a determination that he's innocent, that he had no culpability whatsoever. We're saying is that [165] cumulatively, following Kuhn (sic), that this court has followed in other cases, cumulatively, looking at all of the argued grounds for a downward departure, except for disparity, and then factoring in the significant component of disparity, what is fair here, what is reasonable, what is likely to stand the test of appellate scrutiny is a sentence that does reflect – I'm not predicting –

THE COURT: I want to withstand appellate scrutiny in the sense that I don't want to make any obvious errors. But I have to impose a sentence that I believe is legally permissible and most appropriate, I think, after Booker. And I'm not the last word. I'm not the ultimate judge on earth of this. If the government decides to appeal, there will be another review.

MR. RUSSONIELLO: Normally, the disparity component is the nuanced aspect of any sentencing. But in this case, it really is the significant effort, not just because we're focusing on it, but because it kind of coalesces the whole notion of the respective responsibilities of the

parties to a process such as this. And we have – obviously, we have to be sure that we do the right thing in the sense of carrying out our respective responsibilities. And the first – you know, so the first hopscotch step taken in this case was taken [166] by the government. They have very little reason to be surprised, upset, disagree with a sentence that, in effect, is borne of their own effort.

THE COURT: Okay. That's well stated from that position. I've got it.

Do you want to address this fine issue? What was the fine, $125,000.

MR. RUSSONIELLO: There was no fine. There was no fine imposed. There was no fine imposed on Mr. Isola. It was the First Circuit remanded to you for imposition of a fine, set out the range, and said that it was mandated.

THE COURT: What is the fine range?

MR. BROWN: The fine range – I'll have to look back and see what the fine range would be under the Guidelines. What the First Circuit –

THE COURT: Let's look at the presentence report. Isn't it in there?

MR. BROWN: Actually, I think it was 12,500 to 125,000, if I recall.

THE COURT: It says here: The Guideline fine range is 12,500 to $11,676,000 – I mean, $760.

Do the parties agree that's the fine range based upon the calculations in the presentence report?

MS. WINKLER: Yes, your Honor.

[167] THE COURT: I take it that – see, I didn't see Judge Harrington ruling on any of these objections. But does anybody contend that the Guideline calculations in the presentence report are wrong, the Guideline range?

MR. BROWN: The Guideline calculation is not wrong, but post-Booker, of course, you don't look just to the Guidelines and the statutes. All the First Circuit said on remand is that you had to comply with the statutes.

THE COURT: Actually, I don't think that's what it said. I think it said Booker doesn't affect the fine. But let's look.

I'm looking at the April 19 decision.

It says we come to the conclusion that there must be compliance with the statute on payment of fine. So I interpret that to mean, essentially, unless I find Mr. Thurston cannot pay a fine even in installments, I'm legally obligated to impose a fine of at least $12,500.

MR. BROWN: No, I don't think that that's right. Under the fine statute – we're not talking about the Guidelines, we're talking about the fine statute. The number is escaping me right now. 37. The language of that statute is that the court is supposed to look at a bunch of factors, not only 3553, but other statutory factors to determine whether to impose a fine and, if so, [168] how much. So that has to be looked at as well as –

THE COURT: What's the statute?

MS. WINKLER: Its 3571.

THE COURT: Let me put it this way. Let's say it's a discretionary matter. Why wouldn't I impose a fine on Mr. Thurston? If he has the capacity to pay a fine, he's committed a crime – this is a crime that was calculated to make money for his company and could inflate his bonuses – why wouldn't I impose a fine?

MR. BROWN: We've dealt with the issue of personal gain, and there's sort of kind of a crossover here, and the argument on loss overstating the seriousness of the offense we've addressed –

THE COURT: You really want to argue this? You want him to argue this?

MR. RUSSONIELLO: No, I'd rather he argued disparity, that since there was no fine imposed on Isola, the same factors apply to him, and he was probably in a better position to impose a fine – to pay a fine.

THE COURT: I want to give you a chance to argue it. This is helpful to me. I didn't understand what this meant on the statute. But I'll tell you, you've got a white collar case, and you represent a convicted criminal, and it was a crime that was committed to get money, and I can't think of a case, a white collar case [169] I've ever had where I haven't imposed a fine, and the question has been how much?

MR. BROWN: But the principles on disparity are really very similar here.

THE COURT: Maybe I ought to – so, if I focus on the fine for very long, maybe I'll give less weight to disparity.

MR. BROWN: I can't control that, but –

THE COURT: No, but you can control what you want to argue and decide, in view of what I just said to you, whether you want to keep going.

MR. BROWN: Well, the Guideline range starts at $12,500, and it goes up the from there. That's one factor that the court has to consider under 3553(a).

THE COURT: Does the evidence in the trial show what the gain to Mr. Thurston was as a result of this scheme?

MR. BROWN: There's no evidence in the record that shows that. We advanced, admittedly, sort of a speculative construct in a sentencing memo the first time around.

THE COURT: And what did you say the gain was?

MR. BROWN: I think maximum and the most prosecution favorable paradigm was something like – I think it was $6,000 over the course of all these years, [170] and it was something that was negligible. But even that probably overstates it.

MR. RUSSONIELLO: And I think the reason – this is getting to be like an Australian tag team here –

THE COURT: Which I usually don't permit at 5:30 at night. But I do want the answer. Go ahead.

MR. RUSSONIELLO: One sentence, and that is, because the government relied on intended loss rather than actual loss, there really wasn't –

THE COURT: Which is perfectly appropriate.

MR. RUSSONIELLO: Of course.

THE COURT: The Court of Appeals had to decide it, so it isn't always of course.

MR. BROWN: When we're looking at the Guideline fine range as one component and we're balancing that against the other 3553(a) factors, if there is going to be a fine imposed, it ought to be at the low end of that fine range, which takes into account the position that the government took at Isola's sentencing as to what appropriately reflected the seriousness.

THE COURT: Did he pay a fine?

MR. BROWN: He did not.

MR. RUSSONIELLO: $120 special assessment, I think it was.

MR. BROWN: Just the special assessment.

[171] THE COURT: Is the special assessment 120?

MS. WINKLER: It was a hundred.

MR. RUSSONIELLO: A hundred, I'm sorry. With inflation, it's probably 120 now.

THE COURT: Not yet.

Does the government want to say anything about the fine? You want me to impose a fine?

MS. WINKLER: Yes, your Honor.

THE COURT: Do you have a particular amount in mind?

MS. WINKLER: We had asked in the papers for 125,000 on the lower end of the Guideline range, but –

THE COURT: It's not the low end of the Guideline range.

MS. WINKLER: No, at the lower side of it from the 11 million and because it was the defendant was with, at least as of the time the presentence report in 2002, substantial ability. And, again –

THE COURT: Has Mr. Thurston been working in the last several years or devoting himself exclusively to charitable work?

THE DEFENDANT: Second. I have not worked since the trial.

THE COURT: Okay. I have a meeting I have to start running at six o'clock, so I won't get back to this [172] until about seven tomorrow morning, and I have another matter at 10:30. But you should plan to come in at 11:30, and you can call Mr. O'Leary and make sure he knows how to find you at ten. If I'm not going to be ready to decide this matter and sentence Mr. Thurston, I'll let you know, but I'll try.

And I'd like to see counsel briefly in the lobby before we all go home.

Court is in recess.

[173] CERTIFICATE

I, JUDITH A. TWOMEY, RPR, Official Court Reporter for the United States District Court, District of Massachusetts, do hereby certify that the foregoing transcript, pages

1 through 172 inclusive, was taken by me stenographically and thereafter by me reduced to transcription and is a true record of the proceedings in the above-entitled matter to the best of my ability.

JUDITH A. TWOMEY, RPR
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES	)	CR 98-10026
OF AMERICA	)	Boston, MA
	)	June 16, 2005
v.	)	
	)	
WILLIAM THURSTON	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE
SENTENCING HEARING

APPEARANCES:

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[2] THE CLERK: This is Criminal Matter Number 98-10026, United States versus William Thurston.

Court is in session. You may be seated.

THE COURT: Good morning. Would counsel please identify themselves for the record.

MS. WINKLER: Susan Winkler.

MR. ARNOLD: And Jim Arnold.

MS. WINKLER: For the United States.

MR. RUSSONIELLO: Joseph Russniello [sic] with Matthew Brown from Cooley Godward for the defendant, William Thurston, who is present. Good morning, your Honor.

THE COURT: Good morning.

Since I saw you yesterday, I have received the United States' submission on acceptance of responsibility.

Is there anything else I should have received and read, as I have read that?

MS. WINKLER: No, your Honor.

MR. RUSSONIELLO: No, your Honor.

THE COURT: Since we adjourned after about six hours at 5:30 last evening, I've done a considerable amount of additional work relating to the sentencing issues in this case.

To alleviate any unnecessary anxiety, as it's going to take me quite a while to explain my reasoning [3] and rulings, I will tell you that I have concluded that it's most appropriate to reimpose the sentence that Judge Harrington imposed, plus a $25,000 fine.

But I'll tell you and the Court of Appeals as well that I gave no deference whatsoever to Judge Harrington's sentencing decision. And by giving essentially the same sentence, I mean no disrespect to the Court of Appeals which, I think, having read its decision reversing Judge

Harrington, might[,] because it hasn't had a chance to deeply examine the Booker [decision] or the Section 3553(a) factors after Booker[,] expect that a longer sentence would be imposed.

When I – prior to the time that I became immersed in this, I frankly expected I would impose a significantly longer sentence. But I've spent many hours reading the excellent briefs, examining the pertinent parts of the transcript, and particularly examining whether perjury or obstruction of justice had been proven, which it has not.

I've come to the judgment for reasons that I'll explain in detail, that a sentence of three months confinement and two years supervised release with the first three months in home confinement is the sentence that is sufficient and no more than necessary to serve the statutory purposes.

[4] Nevertheless, I considered giving Mr. Thurston more jail time just to provide added evidence, if it's needed, that I have really considered this matter de novo, without any deference to Judge Harrington's judgment. But it just would not be fair in the circumstances to do that.

Perhaps, at least for the record, it would make sense to briefly describe the procedural history.

This is a matter in which the defendant, William Thurston, was indicted on a conspiracy charge with three codefendants, including Joseph Isola, the president and CEO of Damon Corporation.

Prior to trial, Mr. Thurston and his codefendants were offered an opportunity to plead guilty to an information that would have reduced the alleged scope of the conspiracy and foreseeably have led to a probationary sentence, which the government implicitly agreed to by returning

the information, agreeing not to require a presentence report, and waiving any right to appeal.

Mr. Isola took the deal. Mr. Thurston, because he genuinely believed, erroneously, that he was not guilty would not take an oath and admit to a crime that he didn't think he committed. He was tried for about three weeks, as I understand it, and he was convicted.

[5] In view of the intended loss of more than $5 million, as the presiding judge, Judge Harrington, calculated it, among other things the Guidelines, which were then mandatory, contemplated a sentence in excess of 60 months, the maximum the statute permitted. Over the government's objection, the government advocating, I believe, a 60-month sentence, Judge Harrington departed, based in part on Mr. Thurston's exceptional good works, and imposed a sentence of three months incarceration and 24 months supervised release, the first three months in home confinement.

That sentence was appealed by the government. The First Circuit issued a decision reversing the sentence. Before, I believe, mandate was issued, Judge Harrington recused himself because he did not want to carry out the order of the First Circuit, essentially, abdicating his responsibility for the case with which he was most familiar.

But the defendant appealed to the Supreme Court, and before the case actually came back to the District Court, the Supreme Court decided Booker, which added an issue to be decided by the District Court. The First Circuit remanded. However, when Judge Harrington recused himself before the case was back here, pursuant to the

Court's standard practice, it was randomly reassigned and [6] drawn by me.

As I'll describe in a moment, the mandate of the First Circuit requested or directed that I deal with this matter promptly because it had been pending for so long. As soon as mandate issued, I on May 16 ordered briefing and replies, which were filed. They were excellent. And I've given this the highest priority and have studied it intensely. I've been deeply immersed in it, this week particularly.

As I said, on April 19, 2005, the First Circuit remanded this matter because the Booker decision rendered the Guidelines advisory. I was directed to reconsider the sentence that Judge Harrington had imposed of three months in prison and three months home confinement as part of supervised release. In light of the Section 3553(a) factors, I am called upon to decide what is the most reasonable and appropriate sentence, taking into account among the other 3553(a) factors the Sentencing Guidelines.

I was directed to decide if the government had proven the requested enhancement for obstruction of justice based on purported perjury, an issue that was raised at the initial sentencing but not decided because the Guideline range was already above the statutory maximum of 60 months.

[7] As I said, I was asked or ordered to address the matter promptly, and I have endeavored to do so. I issued the May 16, 2005 order directing briefing and scheduling the receipt of replies. Excellent memoranda were filed by both parties. Voluminous appendices, including the whole trial transcript, were provided. On June 19, I issued a

supplementary order bringing to the parties' attention the First Circuit's decision last week in the Wilkerson case, which related to, among other things, resentencing based on disparity.

Yesterday, I conducted a hearing for about six hours. The majority of that time was focused on the record and the arguments relating to the obstruction of justice enhancement which, as I'll describe and as I described yesterday, is of considerable importance to my analysis.

The defendant has argued that many issues decided earlier by Judge Harrington relating to sentencing should be reopened on remand. Perhaps the paradigm is the argument that the amount of the intended loss should be calculated again, at this point. A remand does not reopen an entire case automatically. However, the court may reopen a decided issue only in very special circumstances. Essentially, you need a change in the law, like Booker, significant new evidence or a blatant [8] error in a prior decision, as the First Circuit said in Bell, 938 F 2nd 247 at 251.

The defendant argues that, after Booker, sentencing enhancements must be proven beyond a reasonable doubt. If this were true, this would reopen – this would justify reopening issues like intended loss because it's possible that the evidence might be sufficient to prove intended loss by a preponderance, but not beyond a reasonable doubt.

However, as the First Circuit among other courts has indicated, under the current advisory Guidelines regime proof by a preponderance of the evidence remains the standard for enhancements. The First Circuit indicated

that in Gonzalez-Mercado, 402 F 3rd 294 at 302 to 3, and in Antonakopoulos, 399 F 3rd at 75.

Moreover, contrary to the defendant's contention, the court deciding enhancements rather than a jury does not violate the defendant's right to due process, essentially for the reasons described by the Eleventh Circuit in Duncan, 400 F 3rd 1279 at 1307.

As I said yesterday, essentially, because there's new evidence, that is, evidence of the defendant's position at this particular point in time, I believe it is appropriate, it is permissible for me to consider anew whether the defendant should receive a two [9] level reduction for acceptance of responsibility. That's not an historic fact like intended loss back in 1988 to '93 that couldn't change now. Acceptance of responsibility is significant because it relates to what kind of sentence is necessary for the person being sentenced at the time he's being sentenced.

Statements, as I'll describe later, that Mr. Thurston made yesterday present quite a close question with regard to acceptance of responsibility. They're comparable to the nolo plea which Isola entered and got acceptance of responsibility for in the sense that he has admitted the relevant facts in the indictment. The jury has decided they constitute crime. Mr. Thurston accepts that. As I said, it's comparable to a nolo plea as described by the Supreme Court in Lott versus United States. But I'm treating this matter as if Mr. Thurston did not get credit for acceptance of responsibility or, as I'll explain, it's immaterial.

The two issues that are material are the government's contention that Mr. Thurston should get an enhancement for obstruction of justice and the implications or effects of the Section 3553(a) factors. More precisely, the issue is

whether the Section 3553(a) factors justify and make most appropriate a non-Guideline sentence.

[10] In my view, the First Circuit has already decided that the defendant's good works do not justify a downward departure. However, as the government recognized yesterday, they can appropriately be taken into account under a Section 3553(a) analysis. Among other things, they're relevant as part of the history of the defendant and the need for a sentence to protect society from any potential danger.

The corollary of my finding that it's not appropriate for me to reconsider historic facts found by Judge Harrington, which tend to favor the government, is my decision to give some deference to other facts found or observations made by Judge Harrington, who had the advantage that sentencing judges usually have of sitting through the trial, seeing the witnesses, getting a feel for the defendant, and being able to judge credibility based on all of those opportunities and experiences.

For example, Judge Harrington found that Isola was the prime architect of the conspiracy and more culpable than Mr. Thurston. That's a finding I noticed is consistent with the original charges in the case that charged Isola with a broader conspiracy than Thurston was charged with. And as I will reference at appropriate points, I accept that Isola was the prime architect of the conspiracy and more culpable than Mr. Thurston.

[11] With regard to the Booker standard, I discussed this in one of my May 13 Ferrara decisions, but I think reconfirmed yesterday, there's a consensus, the government agrees, essentially, after Booker I have to calculate the Guidelines, if possible, but they are advisory. I also

have to tailor a sentence in view of the Section 3553(a) factors and decide what sentence is the most reasonable and the most appropriate.

As the government also agreed yesterday and as many cases indicate, I can and should, in fact, must, among other things, consider the disparity between codefendants under Section 3553(a)(6), I believe it is.

(Short pause.)

THE COURT: Section 3553(a)(6) relates to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

There are cases that hold that in contrast to the situation before Booker, as described in First Circuit cases like Wogan, the court can and should now look at codefendants as well as the national population. Some of the cases consistent with that are Wilkerson, 2005 Westlaw 1355138; my May 13 Ferrara sentencing decision; the First Circuit's decision in Schneiderhan, 404 F 3rd 73, where the First Circuit did a factual [12] analaysis [sic] and found that the codefendants were not similarly situated, but did not find that was not cognizable as a matter of law; Hensley, 363 F Supp 2nd 843; Revock, 353 F Supp 2nd 127; Colby, 307 F Supp 2nd 61; Jaber, 362 F Supp 2nd 365.

I understand that an important purpose of Section 3553(a) and the Guidelines is to diminish unwarranted disparity nationwide. However, Section 3553(a)(2)(a) emphasizes that a sentence must also promote respect for the law.

Giving the prime architect of the scheme in this case a sentence of probation and giving Mr. Thurston a sentence

of 60 months, as the government advocates because he rejected a similar deal and exercised his right to a trial, would greatly injure respect for the law unless the disparity is warranted by some legitimate consideration.

The government argues that Isola's plea was pursuant to a charge bargain. He pled guilty to an information charging him with a conspiracy relating to a test involving Apol, not Ferritin, the test that was the alleged object of the conspiracy on which Mr. Thurston was convicted. However, Mr. Isola's case is not distinguished from Mr. Thurston's case because there was a different conspiracy or different actual criminal [13] conduct.

The government originally charged Isola with a conspiracy relating to Apol, relating to Ferritin, and relating to a third test, I believe, involving dialysis. The only reason that the charge of conviction with regard to Isola is Apol is that the government, by agreement with Isola, returned an information that it wasn't obliged to return and voluntarily narrowed the charge by agreement with Isola. The Ferritin and the third object of the original alleged Isola conspiracy would have been relevant conduct, even under the information, and the government believed it would prove that. The fact that it abandoned charges that it had originally brought and believed it could prove does not provide any principled distinction between Mr. Thurston and Mr. Isola, making Mr. Isola somehow less culpable.

What I read and learned, confirmed what Judge Harrington found – that Isola was at least as culpable as Mr. Thurston. His conspiracy was at least as broad and probably broader, and Judge Harrington found that Isola was the prime architect of the scheme, more culpable.

In tendering the – in agreeing to the plea agreement with Isola, as I'll discuss again later, the government implicitly represented that the probationary [14] sentence that it knew would be imposed as a result of that agreement was sufficient to promote the statutory purposes of Section 3553(a) and would not perpetuate unwarranted disparity. This is fundamental to any plea agreement that is offered, as discussed in the 1992 Guideline Manual, the applicable Manual, Part B, in the Introductory Commentary at page 341.

In addition, by offering – by agreeing to that plea bargain and presenting it to the court, the government implicitly represented under Section 6B1.2 that the remaining charges adequately represented the seriousness of Isola's actual offense behavior, including relevant conduct, and that accepting the plea would not undermine the statutory purposes of sentencing or the Guidelines. Therefore, there should be a legitimate difference between Isola and Thurston to justify a substantially longer sentence for Mr. Thurston.

As I'll explain, the fact that Mr. Thurston went to trial and Mr. Isola did not justifies some reasonably greater sentence for Mr. Thurston, because Isola's nolo plea permitted – might have permitted the conservation of some prosecutorial or judicial resources. In this case, it really, as far as I can tell, did not. There was going to be a trial anyway. Mr. Isola easily could have been tried with Mr. Thurston. There's no showing [15] that trial would have taken longer or much longer. And usually when somebody is getting acceptance of responsibility under the current Guidelines, if you plead guilty early enough so somebody doesn't have to prepare for a trial, you get a one

point reduction, which is basically about six months on the range.

Acceptance of responsibility in theory could be a material distinction between Isola and Thurston, but Isola did not unequivocally accept responsibility. He entered a nolo plea. And what Mr. Thurston said to me yesterday, as I noted earlier, was similar to what one says in a nolo plea.

He said in part – and it will probably show up on about page 126 or 127 of the transcript when it's prepared: "You try to do what's right, and sometimes you can look back and say it wasn't. So for whatever responsibility I have for mistakes which may have been made, although at the time I didn't feel inside they were wrong, I accept that responsibility, and I'm certainly willing to pay whatever price is required." Essentially, in a nolo plea, as the Supreme Court described in Lott, the defendant admits the essential facts, and it's the court that enters judgment. He doesn't, as he does in a guilty plea, acknowledge that he's guilty.

What would certainly be a material distinction [16] between Isola and Thurston would be any perjury by Thurston if there were no comparable perjury by Isola. But I would say that, actually, without qualification probably because Isola got his plea deal before he testified. So what would certainly be a material difference between Thurston and Isola would be perjury by Thurston at his trial and, therefore, the allegation of obstruction of justice in the form of perjury has been important to me, not just to calculate the Guideline sentence range, but to decide the effect of the Section 3553(a) factors.

With regard to obstruction of justice by committing perjury at trial, the government has sought an enhancement

under Section 3C1.1 of the 1992 Guideline Manual for alleged perjury by Mr. Thurston at trial.

The pertinent part of Section 3C1.1 stated: "If the defendant willfully obstructed, or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense by 2 levels."

Application Note 1 at that time ended by saying: "In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most [17] favorable to the defendant."

The First Circuit has always required that this enhancement be proven by a preponderance of the evidence. It did that prior to the 1997 amendment in cases such as Amylek, 926 F 2nd 64 at 67, and Thomas, 86 F 3rd 263.

The First Circuit explained the meaning of Application Note 1 in Tracy, 36 F 3rd 199 at 203 to 204. It said in part: "Tracy is apparently under the impression that this quoted language," the language I read, "means that, in general, close cases under Section 3C1.1 must be resolved in favor of the defendant. This is a misreading of the commentary and an exaggeration of the government's burden. We have repeatedly said that this commentary does not mandate the resolution of every conflict in testimony in favor of the defendant. It merely resolves in the defendant's favor those conflicts about which the judge, after weighing the evidence, has no firm conviction. We note, in addition, that the quoted commentary read literally addresses a rather narrow problem peculiar to perjury, and other charges that match a defendant's

testimony against the truth as later found by the judge or jury. Words even in context can be subject to more than one plausible reading, and this is as true in parsing the testimony of the defendant at trial as in construing a statute. In a perjury case, [18] one of the plausible readings may be in conflict with 'the truth' and undoubtedly willful if that meaning were intended; the other reading, also plausible but perhaps less so, may render the defendant's statement accurate or at least make willfulness unlikely."

Similarly, in McKeeve, 131 F 3rd 1 at 15, the First Circuit instructed that "a sentencing court required to apply that language," meaning the language in the note that I read, "today need only construe allegedly perjurious statements in a defendant favorable way if such statements are genuinely ambiguous or if the record after the credibility determinations have been made plausibly supports an innocent interpretation."

The Supreme Court in Dunnigan, 507 US 87 at 94, particularly wrote regarding perjury in Section 3C1.1. It stated that perjury is a false statement – I'm sorry, "false testimony concerning material matter with the willful intent to provide false testimony rather than as a result of confusion, mistake, or faulty memory." As instructed by Dunnigan, I must decide independently if perjury occurred. I understand that it's preferable for a District Court to address each element of the alleged perjury in a separate and clear finding. I understand that a statement is material "if it is capable of influencing the jury or might have influenced its [19] decision," as the First Circuit wrote in Doherty, 906 F 2nd 41 at 43.

I understand that perjury goes to the heart of the integrity of the judicial process. It's a serious offense, and it deserves to be seriously punished. I don't hesitate to impose the perjury enhancement in appropriate cases. Indeed, I was just affirmed last month by the First Circuit for doing so in Meada, 408 F 3rd 14 at 24 and 25. But this is not a case in which the perjury enhancement has been proven.

In its May 31, 2005 sentencing memo, the government identified three areas of alleged perjury. At the June 15, 2005 sentencing hearing, the hearing yesterday, the government stated that it was no longer relying on the third – it was actually probably the second – but one of the three areas of alleged perjury it had alleged because it recognized that it did not have sufficient evidence to prove it. More specifically, that was the government's earlier claim, that Thurston falsely denied knowledge of price differentials being charged to Medicare patients and non-Medicare patients.

At the June 15 hearing, the government attempted to add a fourth form of alleged perjury, that is, Thurston's purported denial – Mr. Thurston's denial that he conspired to commit the crime of which he was later [20] convicted. The testimony the government pointed to was in the December 10, 2001 transcript at 79 SF 140, exhibit 1 in the sentencing hearing T1.

I did not allow this to be argued on the merits because neither the defendant nor the court were given notice that the government was relying on this claim. I felt it would violate due process for me to decide the issue and perhaps enhance the sentence on the basis of a matter raised for

the first time yesterday, at least without a continuance. I did not – I wasn't asked for a continuance but, in view of the First Circuit's direction that I resentence Mr. Thurston as promptly as possible, it would not have been an immediately attractive option.

The defendant had already written a very substantial, detailed reply brief addressing each of the government's three original claims of alleged perjury. I spent many hours studying the record with regard to each of those three claims. It would have been unfair to have added a new issue yesterday and to have continued the matter.

Moreover, I'll add for completeness – I have thought about this further, and I focused on the particular question and answer. A general denial of conspiring is too general, I think, to be the basis of a perjury enhancement. If that were cognizable, it would [21] be – it would subject every defendant who was convicted in a conspiracy case to the enhancement and undermine the requirement of Dunnigan that the court – actually, take a step back. It would subject every defendant who testified that was convicted in a conspiracy case to the enhancement and undermine the requirement of Dunnigan that the court closely analyze each allegedly false statement.

Also, in this case, based on my independent assessment, I find that the defendant may have honestly believed that he was not engaging in a conspiracy that violated Section 371. The jury disagreed. But I'm not persuaded that when he testified that he didn't conspire he gave that testimony willfully.

I asked the government to focus me on what it felt was its strongest case on the alleged perjury. The government told me that it felt its best case for perjury is Mr.

Thurston's December 11, 2001 testimony on transcript pages 53 and 21, which relate to a meeting in January 1988 in Park City, Utah.

On page 53, the question was: "Did you give instructions to any of the general managers for Chicago, Newbury Park, or Phoenix at that meeting that they were to add Ferritin to the Chemistry Panel?" Mr. Thurston's answer was: "No, I did not."

[22] On page 21, also discussing the Park City meeting, the question and answers were as follows: "And your testimony is that it was up to the laboratories to decide what to do about that, if anything? Yes. And that it wasn't your idea or an idea from corporate to do that? Answer: There were options discussed at the Park City meeting, and I discussed options with the general managers. Question: But your testimony is it wasn't your plan and it wasn't your idea, it was a local plan? Answer: That's correct."

The meeting was a January 1998 meeting in Park City, Utah. The questions, at least the question on page 53, related to the general managers of three laboratories, Chicago, Newbury Park, and Phoenix. It did not relate to the San Francisco laboratory.

The question on page 53 was whether Thurston instructed any of those three general managers at that meeting to add Ferritin and thus created a national program. "Instruct," I find, means essentially to direct.

Mr. Thurston in his testimony admitted that he discussed the issue of adding Ferritin to the test – I'm sorry, Ferritin to the Lab Scan package. He didn't claim that he had no knowledge of the issue. What he did testify,

as he did on page 21, was that this option was [23] discussed, but that he did not instruct or direct the beginning of a national program.

So the question is whether the government has proven by a preponderance of the evidence that the defendant instructed three general managers at Park City to add Ferritin to the Lab Scan. It has not.

The jury could have convicted the defendant of conspiracy without finding this testimony to be false. For example, if others had made the decision to add Ferritin and the defendant agreed, he would be guilty of conspiring, but he didn't instruct other people to add Ferritin. Similarly, if all of the participants at the Park City meeting as a group had reached a decision, but Mr. Thurston didn't instruct the general managers at Park City, he would be guilty of conspiracy, but wouldn't have instructed, and it wouldn't necessarily have been his idea. Similarly, the statements at issue would not be perjurious if a national program evolved after the Park City meeting and within the period of the alleged conspiracy, but not on the basis of an instruction or direction given by Mr. Thurston in Park City.

Most of the witnesses on whom the government relies were unindicted coconspirators who were immunized. I, as we regularly instruct juries, have to scrutinize their testimony with care and rely upon it with caution [24] because they have an obvious incentive to lie or to shade their testimony to help themselves and avoid prosecution. That's the standard First Circuit Pattern Instruction, Section 207. It's in cases cited by the First Circuit like Hernandez, 109 F 3rd 13 at 17.

In addition, the witnesses were testifying in 1991, 13 years after the Park City meeting. There's an obvious risk of faulty memory in such circumstances.

There is no witness who attended the Park City meeting who testified that Thurston instructed that Ferritin be added. The government's first excerpt of testimony as evidence of this is testimony by Prichard, the general manager of the San Francisco lab, who was not at the Park City meeting. His testimony was that he believes that sometime after that meeting Thurston told him to add Ferritin. He has no direct evidence concerning what Mr. Thurston said or did at the Park City meeting.

Wilson, the general manager of the Phoenix lab, was at the Park City meeting. However, he did not add Ferritin to the Lab Scan test until the following September, and he wrote a memo describing the local process that led to his decision to do so.

Isola testified that it was a local decision.

The government relied in part – relies in part [25] on the testimony of Bryant, the Newbury Park general manager. He was an unindicted coconspirator and immunized witness. Judge Harrington said that he found him to be the least credible witness who appeared at trial. But Bryant was not at the January 1988 Park City meeting. He testified that he was not involved prior to March 1988. And he testified that the decision to add Ferritin was made prior to his involvement. He does not – he did not testify that Thurston made that decision or gave instructions concerning it.

Moran, the Newbury Park sales manager, testified that it was a corporate decision to add Ferritin. But she

did not testify that Thurston made that decision or instructed the labs represented at the Park City meeting to do so. In fact, as I'll discuss again later, she says that it was another codefendant, now deceased, I believe, Beno Kon, who was the one who was promoting adding Ferritin without giving doctors a choice, and she resisted that.

Carson of the Chicago lab does have notes that appear to be notes of conversations with Thurston on February 24, 1988. Those notes do not relate to what transpired at the Park City meeting. Those notes reflect in part a discussion of options, not decisions or instructions. One option was to add Ferritin to what I [26] understand is Lab Scan, although its called SMAC. The notes suggest that analysis was to be done about the impact of adding Ferritin to the test and, in this sense, are consistent with the conclusion that no national program was adopted at the defendant's instruction in Park City in January 1988.

So, in this case, it's at least plausible and, I think, most appropriate to interpret the defendant's testimony at issue as being that he did not at the Park City meeting in January 1988 instruct the three general managers to add Ferritin to the Lab Scan test, although this was an option that was discussed at that meeting, according to his testimony.

In addition, he testified, in effect, that at the time of the Park City meeting there was not a nationwide program ordered or directed. This was just an option discussed.

The government has not proven that either of these statements were false, and it has also not proven that, if inaccurate, the inaccuracy was willful.

The defendant testified 13 years after the meeting. He admitted discussing the addition of Ferritin. He denies instructing the adding of Ferritin. But, as I said, there's nobody who was at the meeting who said that he did instruct that it be added.

[27] He denies that he ordered a national plan, and Phoenix – the Phoenix lab was not part of any purported national plan, at least until September, and the evidence indicates the Phoenix lab made that decision independently or at least locally.

So the government has not proven what it characterizes as its strongest perjury claim.

The second perjury claim is under tab T3 of the excerpts provided yesterday, exhibit 1. On page 8, Mr. Thurston was asked: "Did you at any time instruct Mr. Bryant or anyone else, for that matter, at Newbury Park that they were not to promote the fact that Ferritin could be ordered as a stand-alone test?" He answered: "No."

On page 53 of the December 10, 2001 testimony, the questions and answers were as follows: "The requisition" – talking about a form – "the requisition again had no choice in the preprinted section, right? Answer: No, it did not. Question: The requisition in Northern California had no choice in the preprinted section, correct? Answer: That's correct. Question: And in Chicago the test was added at no extra charge or cost, correct? Answer: Yes. And the requisition in Chicago also provided no choice in the preprinted section, correct? Answer: Yes. Question: And it's [28] your testimony that in all those different laboratories under your direction, it just happened that way in Illinois and Arizona and Southern California and North Carolina?

Answer: It just didn't happen. It was an option that those general managers chose to do."

The key question here is whether the defendant instructed Bryant or others not to promote to doctors that the Ferritin was being provided to them, the Ferritin test was being provided to them free.

Bryant does testify that Thurston directed him on that point. However, Bryant, as I noted earlier, was an immunized witness. Judge Harrington said he was the least credible witness in the case.

Antonacci of Newbury Park testified that it was Beno Kon who wanted to get the test out, not Thurston, and that Moran of Newbury Park resisted.

Isola testified that it was a local option. Essentially, Isola's testimony, again, was consistent with Thurston. I am talking particularly about his December 5, 2001 testimony at pages 89 to 90.

In these circumstances, the government has not proven by a preponderance of the evidence that the cited statements were false or, if they were inaccurate, that they were willfully false or inaccurate.

So that resolves the issues that relate to the [29] Guideline calculation. Without acceptance of responsibility, the defendant, as he was found to be by Judge Harrington, is a Level 26, Criminal History Category I. The Guidelines would be 63 to 78 months.

If he got a two level reduction for acceptance of responsibility, he would be a 24-I, and the Guidelines would be 51-63 months. The maximum, in either event, is 60 months, and the 60 months is in overlapping range.

But do the parties agree – and the other Guideline calculations would be 24 to 36 months supervised release, a fine range of $12,500 to $11,600,760, and a hundred dollar special assessment.

Do the parties agree that those are the Guideline ranges?

MR. RUSSONIELLO: Yes.

MS. WINKLER: Yes, your Honor.

THE COURT: The defendant's statement yesterday, as I noted before, is similar to Isola's nolo plea. He accepts the facts, but he doesn't admit the crime. The jury found the crime. Nothing I'm saying today is intended to indicate that the defendant is not properly convicted. But it doesn't matter if the Guideline range is 26 or 24. The non-Guideline sentence is appropriate for the reasons I'll discuss in either event. I'm proceeding on the assumption that no adjustment for [30] acceptance of responsibility is appropriate. 63 months rather than 51 months is the low end of the Guideline range. But I'm not required necessarily to decide this issue, as the Second Circuit explained in Crosby, 397 F 3rd 103 at 112, because in this case, whether the bottom of the Guideline range was 63, as I assume, or 51, as it might reasonably be deemed, possibly be deemed, the sentence I'm imposing is the reasonable and most appropriate sentence in view of the Section 3553(a) factors.

Perhaps I should have said this earlier but, in the ideal world, I would have taken this under advisement. I would have spent even more time organizing this and expressing it and, I suspect, expect if I wrote it I'd be able to amplify these reasons. But I'm immersed in this now. As

the First Circuit noted in asking me to do this promptly, this has been going on for a very long period of time. So I'm going to do this orally and, I hope, clearly. But there's some redundancy. Such is the plight of a District Judge.

Under Section 3553, I have a statutory obligation to impose a sentence "sufficient but not greater than necessary to comply with the purposes set forth in Section 3553(a)(2)."

As I noted earlier, the government agreed to a [31] probationary sentence for Isola and offered the same deal to Mr. Thurston before he went to trial. The government yesterday quibbled with whether it agreed with the probationary sentence, but it confirmed that it knew that Judge Harrington would impose a probationary sentence if it returned an information that narrowed the charge of conspiracy to Apol, and it did that.

The government waived the preparation of a presentence report. The government did not argue to Judge Harrington that Ferritin and the dialysis objects of the original conspiracy charged were relevant conduct. And the government, remarkably, agreed not to appeal the foreseeable probationary sentence. It's common for defendants to be required to waive their right to appeal. I can't remember a time I saw the government waive its right to appeal.

So I think it's most accurate to say that the government agreed to what it knew would be a probationary sentence, and very much wanted to obtain that sentence and that conviction.

As I said earlier, in making this agreement, in presenting it to the court, the government was implicitly representing that a sentence of probation would "promote

the statutory purposes of sentencing prescribed in Section 3553(a)" and would not create "unwarranted [32] disparity." That's what the Introductory Comment to Part B concerning plea agreements in the 1993 Manual says that the policy statements that follow it are intended to ensure. And when the government or the defendant asks the court to do something, or to accept the plea agreement, they are, in effect, representing that if the judge does what the plea agreement provides or permits, that will promote the statutory purposes of sentencing prescribed in Section 3553(a) and would not create or perpetuate unwarranted disparity.

The plea agreement involved the dismissal of a broader conspiracy charge. So the government had to persuade the court that "the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement would not undermine the statutory purposes of sentencing or the sentencing guidelines." That's in Section 6B1.2(a), which makes clear that actual offense behavior includes relevant conduct.

In reaching this agreement with Isola, the government, as I think it says in its written memoranda and I think as it explained at the hearing yesterday, reasoned that obtaining the conviction of a high health care company executive would adequately send a deterring message to others similarly situated, among other things. [33] The government felt that what was necessary and at least minimally sufficient was to obtain a conviction and that the conviction in and of itself would serve the statutory purposes of sentencing.

Implicit in the Isola plea agreement, and the same agreement or opportunity being offered to Mr. Thurston,

was the government's view that the probationary sentence was minimally adequate prior to trial to reflect the seriousness of the offense. If the government did not believe these things, it could and should have gone to trial against Isola, particularly because it was going to trial against Thurston anyway.

The government could have insisted on global pleas, when everybody pleads or we go to trial and deal with sentencing at the end. Again, that's not unprecedented. It's precisely what happened in my Ferrara case back in 1991.

The Guidelines were intended to diminish the unwarranted disparity that Congress and the President felt had resulted from decisions made publicly by neutral judges. The Guidelines were not intended to authorize unwarranted disparity created by prosecutors who are not neutral and who do not have to explain their decisions publicly. The Federal Court's Study Commission noted the discretion that prosecutors had back in 1990 and the [34] great shift of discretion from judges to prosecutors that the Guidelines had generated. Numerous commentators have observed and, I think, documented that discretion has not been eliminated by the Guidelines, but it has been shifted, and it is often exercised by prosecutors now rather than by judges. This has been a growing problem over time.

Later today, as I told you yesterday, I will conduct the sentencing, to the extent I can, of two members of La Cosa Nostra, the Mafia. But I'm not going to be able to reliably calculate the Guideline range as the law requires me to, because the government with regard to Frederick Simone and Vincent Gioacchini entered into plea agreements that are in the record in this case saying that the government would not provide evidence of relevant conduct.

We've somehow evolved – and I'm going to accept that as reasonable in the unique circumstances of those two cases with which I'm quite familiar – but we've evolved to the point that in a particular case the government may argue that the court has no discretion to ignore relevant conduct or to ignore the true facts and, in another case, when it seems to suit their convenience, keep that real offense sentencing from occurring by agreeing not to present evidence or just not doing it, so [35] the adversary system doesn't work.

Unwarranted disparity is a problem because we strive to administer equal justice under the law. But unwarranted disparity caused by the conduct of the prosecutors greatly injures respect for the law, which is a Section 3553(a)(2) factor. It's there in Section 3553(a)(2)(a).

As the government recognizes and told me yesterday it recognizes, the court can, after Booker, take into account unwarranted disparity between codefendants under Section 3553(a)(6), which, as I said earlier, directs courts to consider "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct."

I recognize that this provision is primarily intended to diminish unwarranted disparity nationally. However, as the cases I cited earlier recognize, there can be cases in which the disparity in sentencing between similarly situated codefendants would be so pronounced that to impose those disparate sentences would injure respect for the law and confidence in the administration of justice.

This is one of those cases. I would say this is what I expect will prove to be one of those rare cases.

Isola and Thurston are similarly situated except [36] Mr. Thurston went to trial. And, indeed, the government recognized they were similarly situated. They offered them the exact same plea bargain.

Isola – and, if anything, Isola was more culpable than Thurston, as Judge Harrington found – Isola was charged with a broader conspiracy. To get a plea, the government narrowed the alleged conspiracy to Apol, but this does not alter Isola's real offense conduct. Isola was the prime architect of the scheme and more culpable than Thurston, according to Judge Harrington who tried the case and, as I said, had an opportunity to develop that judgment. I accept that conclusion.

Contrary to what the Court of Appeals seemed to have thought in its decision, Isola did not cooperate with the government. The government made that clear yesterday. In fact, Isola would not even meet with the government before his testimony.

Isola's testimony was consistent with Thurston's. Judge Harrington found that, and the parts of the testimony that I've looked at confirm it. For example, they both testified that adding Ferritin was a local option.

To the extent that the government believes Mr. Thurston committed perjury, Isola did too. But the [37] government has made no effort to prosecute him for perjury.

As I said earlier, Mr. Thurston's statement yesterday was essentially the equivalent of Isola's nolo plea. Mr. Thurston now realizes and acknowledges that what he did was not right and takes responsibility for his mistake. He

only says to me that he did not realize at the time that he was committing a crime.

As I noted, Mr. Thurston was offered the same plea agreement as Isola, and it was foreseeable that he too would have gotten a probationary sentence if he had accepted it.

This is not a case – take a step back. This case is unusual. It may be unique in my experience so far. This isn't a situation where a defendant did not – well, insisted – let me say this again.

This case is unusual, if not unique. This is not a case where the defendant decided to go to trial because he wanted to avoid any jail time. Sometimes somebody will resist a plea agreement that says, you know, you've got to do a year in prison, recognizing that he might get five years in prison if he goes to trial and loses, because he doesn't want to go to prison at all.

This is a case where Mr. Thurston had the opportunity to immediately get a probationary sentence, [38] avoid the uncertainty, anxiety, and expense of trial, and avert the risk of being in the predicament that he's been in for the last several years, facing a prison sentence. In fact, he's already gone to jail.

This is a case – Ms. Winkler you want to listen to this.

MS. WINKLER: Yes.

THE COURT: This is a case where Mr. Thurston went to trial because he was a religious man, and he did not believe that he could honestly plead guilty because he sincerely, although erroneously, thought he wasn't guilty.

It's a grave problem when people who believe they're innocent, and may well be innocent, falsely admit to crimes to avert the potential of lengthy sentences. That's part of the problem I've been contending with in the Ferrara case where the government withheld highly exculpatory evidence, causing a defendant to plead guilty to a murder that he probably didn't commit in order to avert a wrongful conviction and a life sentence. But courts should not abet guilty pleas by people who are either not guilty or who cannot honestly admit they're guilty.

The only difference between Isola and Thurston is that Thurston went to trial. It is not [39] unconstitutional for the government to argue that Mr. Thurston should get a five-year sentence. The First Circuit pointed that out in Rodriquez, 162 F 3rd 135 at 153. And at the time of Rodriquez, there was no opportunity for the court to do anything relating to the disparity between codefendants.

The five years that the government has advocated in this case is within the Guideline range. And I know that the Guidelines are based on the Section 3553(a) factors. They seek to implement those factors, and I give presumptive weight to those Guidelines. And I considered what they prescribe seriously in this case.

And as I said yesterday, I think Judge Lynch gave eloquent, accurate expression to how important Medicare fraud is. It's a serious crime. And, frequently, I think both the Guidelines and the government's recommendations are too low in white collar cases. However, the government's plea bargain with Isola and the offer it made to Mr. Thurston of, in effect, a probationary sentence are evidence that even a probationary sentence would adequately

reflect the seriousness of the offense in this case, which occurred between 1988 and 1993, and afford adequate deterrence to others who might contemplate a similar offense.

In this case, the evidence indicates that [40] there's no need for a sentence to serve the purpose of specific deterrence, that is, to send a message to Mr. Thurston. He's led an otherwise exemplary life, that is, an exemplary life except for the crime he committed that brings him to court.

What the First Circuit wrote generally about good works in white collar cases has a lot of resonance for me. It's similar to what I often say. I don't usually succumb to arguments that somebody who's been making money illegally ought to get a lesser sentence because he used some of that money to buy a wing for the church and put his name on it to get some public acclaim. But that's not Mr. Thurston. He's a genuinely kind and generous man, and it's a function of his being a religious person.

As I said at the outset, prior to getting deeply immersed in this, prior to the hearing yesterday, I anticipated that I would give Mr. Thurston more time in custody than Mr. – than Judge Harrington did because of the seriousness of the offense. But after grappling with this and delving into it deeply, I'm now persuaded that more time in custody is neither necessary nor appropriate and, indeed, if I imposed an additional prison sentence, it would actually injure respect for the law and the administration of justice.

[41] The defendant has served six months in confinement, as I understand it, three months in community confinement, three months in home detention as part of

his supervised release. In the unique circumstances of this particular case, this is sufficient to recognize the difference between pleading guilty or entering a nolo plea and conserving limited prosecutorial and judicial resources and going to trial, sufficient to recognize the difference between Isola and Mr. Thurston.

It's also sufficient to send the necessary message of general deterrence. There are other potential white collar criminals out there. And the government reasoned in this case that even a conviction would adequately serve those purposes. But in my experience, the most – and in my opinion, because you can't prove this, the most significant decision in sending a message to potential white collar criminals is the decision whether to send the defendant to prison or jail or not give him any jail time. It's not so much the amount of time, it's whether you go away.

And so I think the sentence that Mr. Thurston received, which involved some jail time and six months of confinement of one sort or another, is minimally adequate to serve the general deterrent requirement of the statute.

[42] If I gave Mr. Thurston a lengthy sentence or, indeed, any additional time, particularly a lengthy sentence, it would send the message to reasonable people that it's just too risky to exercise their right to a trial and that the government could manipulate drastically their sentence, depending on whether they exercised that constitutional right, and that no court could or would moderate that manipulation.

Medicare fraud is, when proven, a serious crime. I have at times expatiated at great length on why that is not a victimless crime. But not everyone charged is guilty or can be proven guilty. We had in this courthouse last year

acquittals in the TAP Pharmaceutical cases which illustrate this. And after those acquittals, my colleague, Judge Woodlock, was compelled to vacate the guilty plea of one defendant who did not go to trial because he realized there was a lack of a factual basis for that guilty plea.

It will promote respect for the law in this case and serve the interest of justice more generally if Mr. Thurston pays a price for going to trial but does not receive a Guideline sentence. And he has paid a price in terms of his liberty, among other things.

Among other things, the sentence being imposed should remind the government of its duty to be consistent [43] in its positions within a particular case and between cases, and of the responsibility that it shares with the court to ensure that there is not unwarranted disparity at sentencing.

I've considered the issue of a fine, which is within the scope of the remand. I've considered the fine statute, Section 3571. I find that the imposition of a fine and a fine within the Guideline range is appropriate. While I don't have updated financials, I have no reason to believe, and it wasn't argued, that Mr. Thurston couldn't pay a fine. I'm imposing a fine of $25,000. This was a financial crime, and there should be a financial penalty. There will be.

Mr. Thurston, please stand.

With regard – let me make sure I understand this correctly. I've looked – let me get the judgment.

My understanding is – you can sit down for just a minute. My understanding is that Mr. Thurston was sentenced by Judge Harrington to three months in custody, 24 months supervised release, the first three months

in home confinement, and on the special condition that he not possess a firearm or other dangerous weapon. There was a $100 special assessment, but no fine, and that he serve both the three months in custody and the supervised release?

[44] MS. WINKLER: That's my understanding, your Honor.

MR. RUSSONIELLO: Yes.

THE COURT: Well –

MR. RUSSONIELLO: What we would –

THE COURT: I think it's most appropriate for me to essentially give him a time served sentence, or I can give him credit for what he's done, and maybe that's the way to do it.

MR. RUSSONIELLO: I was going to suggest that perhaps a due date for the payment of the fine, 12 months out.

THE COURT: No, not 12 months.

MR. RUSSONIELLO: Or six months.

THE COURT: I had in mind like about one month. Want to talk to your client? What's the minimum time it's going to take him – and you better do this instead of Mr. Brown. Until I pronounce the sentence, I can change my mind. I want to know what the minimum amount of time to pay the $25,000 is. I had in mind 30 days, maybe 45 or 60 days. I had no intention of going further out than that unless there was a very compelling reason.

(Short pause.)

MR. RUSSONIELLO: 45 days would be fine.

THE COURT: Okay.

[45] MR. RUSSONIELLO: Would be sufficient, I should say, sufficient time.

THE COURT: Mr. Thurston, please stand.

With regard to the one count on which you're convicted, I hereby sentence you to three months in the custody of the Attorney General of the United States, to be followed by 24 months of supervised release on the standard conditions and on the additional condition that you pay a $25,000 fine within 45 days and that you not possess a firearm or any dangerous weapon. There's also a $100 mandatory special assessment.

It's my understanding that you shall and hereby do receive credit for all the time you've served. So you've already served the three months in custody; you've already served the three months home confinement; you've already served the supervised release. And, in fact, I'm not going to make the fine a condition of supervised release, because maybe the supervised release is over. I'm ordering you to pay the $25,000 fine in 45 days, but not as a condition of supervised release.

An alternative way to say this is I'm sentencing you to time served and the supervised release served, plus $25,000 to be paid within 45 days.

You have a right to appeal this sentence within ten days of the entry of judgment. If you'd like to do [46] that but can't afford a lawyer, one would be appointed to represent you at public expense.

A lot has been said in the last two days, certainly a lot has been written in the many years this case has been pending. Certain things shouldn't be obscured by the complexity of the sentencing. One is you committed a crime. You acknowledged certain facts. You acknowledged that you did certain things. The jury found that to be a crime, a crime that was committed knowingly and willfully, and it was a serious crime.

Ordinarily, that crime would require a longer sentence than I have given. But for the reasons I just described, I'm satisfied that the sentence I have imposed is sufficient to serve the purposes that sentences are supposed to serve and is the most reasonable, most appropriate sentence in all of the unique circumstances of your case.

I'm fully satisfied that you're not going to commit any more crimes. But one of the big issues I've been wrestling with is this issue of general deterrence. White collar crimes are crimes of calculation and it's a place where, I think, if general deterrence is going to work anywhere, there's a hope that the sentence will send a message and discourage other people from committing serious crimes. But I think if anybody gets the accurate [47] message of what's happened to you, that should discourage them unless they're extremely greedy and dumb, because you've endured a long, expensive, agonizing ordeal. And you've been incarcerated, which is someplace I know you never thought you would find yourself. You've lost your job. And you've paid a real price.

Sentences are about messages and, to some extent, this sentence sends, I think, an appropriate message to the government too.

As you know, because the Attorney General tells you in the US Attorney's Manual, among other things, you're supposed to be bringing charges that you think you can probably prove and, when you bring those charges, of course, there can be some play in the system. Sometimes you learn things, and there's a good faith basis for not pursuing them. But you should be prepared to try them and, when you get a conviction, you'll have a proper basis for saying to me and my colleagues, this deserves a Guideline sentence.

If on reflection the government thinks it's injured by the sentence that Mr. Thurston has received from me, I would suggest that you read all this and think about it, and I know you'll think about it. You're suffering in meaningful measure from a self-inflicted wound. If a probationary sentence was reasonable for Mr. [48] Thurston before he exercised his right to a trial, the six months of confinement, which is, in effect, the sentence he received, is within the range of reason too. And if a substantially more lengthy sentence is necessary for someone in Mr. Thurston's situation, in the judgment of the government, in retrospect, next time, let's just try them all and see what happens. That is the way our system is set up and, frequently, the government will get a conviction and, sometimes, like in the TAP Pharmaceutical case, you won't.

But, anyway, you all have worked very hard. You did a good job. It's hard to try to catch a moving train, and I know this was very important to everybody, so I tried to get deeply into it and figure it out. And while its inevitable that somebody, sometimes everybody, is disappointed by the decision, because you briefed this so well and argued it so well yesterday, I feel as if I was able to catch this

moving train and at least make an informed decision that was required by the case and make it sooner rather than later, as the First Circuit properly directed me to do.

You may be seated.

MR. RUSSONIELLO: Thank you.

THE COURT: Is there anything further for today?

MS. WINKLER: Your Honor, on behalf of the [49] government, let me just say we also appreciate the time and attention that you brought to this case.

For the record, I would like to at least lodge a couple of objections to the sentence that has been imposed.

First, with regard to the failure to apply the obstruction enhancement on the Sentencing Guideline calculation, the government objects, because we believe there is evidence by a preponderance that supports that perjury was committed by Mr. Thurston, which then, in turn, as your Honor has noted, we also believe influences the application of the 3553(a) factors and does create a basis and a legitimate basis for the disparity in sentence between Mr. Thurston and his codefendant, Mr. Isola.

We also object, respectfully, your Honor, and believe that the 3553(a) factors do not support the sentence that's been imposed, that that's not reasonable or sufficient to meet sentencing purposes. And just briefly, I would reference our view that under (a)(1), the seriousness of the offense, that the Medicare – the crime that has been committed here and for which this defendant was found guilty is sufficiently serious that we believe it outweighs the factor that the court has focused on with regard to

(a)(6) and that, also, in terms [50] of the need for general deterrence under (a)(2) and respect for the laws and the interest of justice, we believe the length of sentence does matter and that while we agree with the court that a conviction in any sense affects white collar defendants that we think the length of sentence also matters and that in terms of (a)(3), (a)(4), and (a)(5), the Sentencing Guidelines, the policy statements, and the other seriousness with which the Congress has brought attention to the health care crimes, we think all of those taken together and for the reasons set forth in the brief and the nationwide sentencing disparity that this court has recognized under (a)(6), but for all those reasons that the sentence imposed – I hear the message your Honor is sending us – but it is not reasonable to accomplish under 3553(a) factors the kind of purposes for which the sentence should accomplish.

THE COURT: Well, I assume that if you appeal, the First Circuit will regard your objections as reserved or made. What you just said essentially summarizes what you wrote and what was argued at length yesterday. Everything you've raised I've considered. Without qualifying anything I said before, it would perhaps have more persuasive value if you hadn't given Mr. Isola the deal you gave him and offered the exact same deal to Mr. [51] Thurston. It is true that foolish consistency is the hobgoblin of little minds, as Emerson said. But anytime you appear before the court and say, accept this plea agreement, you're saying that the sentence that's going to result from this agreement – this is what the Guidelines say you're saying, the Policy Statements say you're saying – will adequately serve the Section 3553(a) factors. And that's what you did in this case, and that's one, not the

only thing that went into my analysis. In part – and the sentence I gave was not for the purpose of sending a message to the government. That might be one of the incidental effects. But it is not the purpose. But when we're talking about respect for the law, and we're talking primarily, although not exclusively, about reasonable members of the public, and that's in part what I had in mind, because while there were elected officials representing the members of the public who were sufficiently concerned about unwarranted disparity generated by the decision of judges who are neutral and operating in the open, unwarranted disparity is at least equally objectionable when it's generated by prosecutorial decisions. You should strive for a system that has discretion, that gives different sentences based on relevant differences between defendants and the crimes they commit, but – and I know I could have given a [52] sentence less than five years and longer than the sentence that was imposed – but as I said, for the reasons I tried to describe in detail, I think starting with a serious consideration of the Guidelines, giving them considerable presumptive weight, with the unique circumstances of this case and this man, the sentence that I gave was both reasonable and most appropriate.

Court is in recess.

[53] CERTIFICATE

I, JUDITH A. TWOMEY, RPR, Official Court Reporter for the United States District Court, District of Massachusetts, do hereby certify that the foregoing transcript, pages 1 through 52 inclusive, was taken by me stenographically and thereafter by me reduced to transcription and is a

true record of the proceedings in the above-entitled matter to the best of my ability.

JUDITH A. TWOMEY, RPR
Official Court Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Cr. No. 98-10026-MLW
	)	
WILLIAM THURSTON	)	

ORDER

WOLF, D.J. June 14, 2005

The parties are hereby informed that on June 9, 2005, the First Circuit held that "[b]oth the need to avoid unwarranted disparities and the history and characteristics of the defendant are among the factors to be considered by the now advisory Guidelines." *United States v. Wilkerson*, 2005 WL 1355138, *8 (1st Cir. June 9, 2005). The parties shall be prepared to address the implications of *Wilkerson* at the June 15, 2005 hearing.

/S/ MARK L. WOLF
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Cr. No. 98-10026-MLW
	)	
WILLIAM THURSTON	)	

ORDER

WOLF, D.J. May 16, 2005

The court is informed that Mandate has issued in this case. In view of the First Circuit's request that this court resentence defendant William Thurston promptly, it is hereby ORDERED that:

1. The parties shall, by May 31, 2005, file, with the court and the Probation Department, memoranda identifying the issues to be decided and addressing the implications of *Booker v. United States,* 125 S.Ct. 738 (2005) for defendant William Thurston's resentencing. The parties shall, among other things, address the court's current authority to consider the disparity between codefendants in fashioning a reasonable sentence and how any such discretion should be exercised. *See United States v. Hensley,* 2005 WL 705241 (W.D. Va. Mar. 29, 2005) at *2; *United States v. Revock,* 353 F. Supp. 2d 127, 129 (D. Me. 2005); *Simon v. United States,* 2005 WL 711916 (E.D.N.Y. Mar. 17, 2005 at *12; *United States v. Schneiderhahn,* 2005 WL 84167 (1st Cir. Mass.); Apr. 13, 2005 at *9; *Ferrara v. United States,* Civ. No. 00-11693-MLW, Mem. and Order Concerning Resentencing (May 13, 2005) at 25-6, 28, 33 (Wolf, D.J.).

2. Any replies and any updated factual information concerning the defendant, including letters on his behalf, shall by [sic] filed by June 8, 2005.

3. A sentencing hearing will be conducted on June 15, 2005, at 10:00 a.m.

/s/ Mark L. Wolf
UNITED STATES
DISTRICT COURT

United States Court of Appeals
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,
Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,
Defendant, Appellee/Cross-Appellant.

Before
Lynch, Lipez, and Howard, *Circuit Judges.*

JUDGMENT
Entered: April 19, 2005

This case has been remanded to us from the U.S. Supreme Court for reconsideration in light of *Booker* v. *United States,* 125 S. Ct. 738 (2005).

In *United States* v. *Thurston,* 358 F.3d 51 (1st Cir. 2004), this court affirmed Thurston's conviction, and, utilizing de novo review of downward departures under the PROTECT Act, found that the district court had erred under the then-mandatory Guidelines system in granting downward departure from a Guidelines sentencing range of 63 to 78 months imprisonment to only three months imprisonment. *See id.* at 78-82. We did not reach the issue of an obstruction of justice enhancement which the government had sought. *Id.* at 81. Because there was statutory maximum sentence of five years, we remanded for imposition of the statutory maximum sentence of sixty

months imprisonment and for imposition of an appropriate fine. *Id.* at 82. This opinion was actually the second time we reached the same result. Our first opinion with the same holdings had issued on August 4, 2003, but then, upon a petition for rehearing, we withdrew the first opinion to revise our discussion of the PROTECT Act. *Id.* at 54 n.1.

While the petition for panel rehearing was pending after issuance of the first opinion, the trial judge (Harrington, J.) recused himself from the case, protesting the de novo standard of review and the length of the sentence that we ordered imposed. *United States* v. *Thurston,* 286 F. Supp. 2d 70 (D. Mass. 2003). The case in the district court was reassigned to a different judge, Judge Wolf. Judge Wolf did not sentence Thurston because after we issued our second opinion, Thurston sought further review in the Supreme Court, and we granted his motion to stay mandate.

The Supreme Court then vacated the judgment in the case and remanded to this court for reconsideration in light of *Booker.* We invited briefs from the parties on the issues of whether the case should be remanded to the district court under *Booker* which we have now received and considered. We reach these conclusions.

Thurston failed to preserve his *Booker* claims at trial, indeed he did not ever raise the issue on appeal. *See United States* v. *Antonakopolous,* 399 F.3d 68, 76 (1st Cir. 2005). Thus, it is his burden to show a reasonable probability that the sentencing judge would, on remand, likely give him a more lenient sentence. We further explained in *United States* v. *Heldeman,* No. 04-1915, 2005 WL 708397 (1st Cir. March 29, 2005):

> [W]e are inclined not to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines. After all, it will be easy enough for the district judge on remand to say no with a minimum expenditure of effort if the sentence imposed under the pre-*Booker* guidelines regime is also the one that the judge would have imposed under the more relaxed post-*Booker* framework.

Id. at *3.

Thurston has sufficiently satisfied the *Antonakopolous* and *Heldeman* standard to warrant remand.

Each side presents to us arguments which are better presented to the trial court on remand. The government argues that any sentence of less than 60 months would be unreasonable. Even if that is true, the argument is addressed to a hypothetical. Judge Wolf may decide to enter a 60 month sentence. We do not give advisory opinions, and have declined to do so, on anticipatory questions of reasonableness in the *Booker* remand context. *See, e.g., United States* v. *Morin,* No. 04-1277, 2005 WL 792411, at *1 (1st Cir. April 8, 2005).

We now remand the case, under *Booker,* to Judge Wolf for sentencing. We note that *Booker* does not affect our earlier conclusion that there must be compliance with the statute on payment of fines. On remand the district court should consider the government's argument concerning applicability of an obstruction of justice enhancement. Nothing we say should be taken as a suggestion or predication about the outcome of the resentencing.

The conviction in this matter was in December of 2001 and sentence has not yet been imposed. For that reason we request that Judge Wolf give prompt attention to this matter.

So ordered.

By The Court:
Richard Cushing Donovan, Clerk

By: MARGARET CARTER
Margaret Carter, Chief Deputy Clerk

[Certified copies Hon. Mark Wolf and Ms. Sarah Thornton, Clerk, United States District Court for Massachusetts. Copies to Mr. Loucks, Ms. Chaitowitz, Ms. Winkler, Mr. Joseph Russoniello, Ms. Conrad, Mr. Walker, and Mr. Brown.]

United States Court of Appeals
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM THURSTON,

Defendant, Appellant.

ORDER OF THE COURT

Entered: March 7, 2005

The Supreme Court has notified this court that the judgment is vacated and the case remanded for further consideration in light of *United States v. Booker,* 2005 WL 50108 (U.S. 2005).

In light of *Booker* and *United States* v. *Antonakopoulos,* ___ F.3d ___, 2005, 2005 WL 407365 (1st Cir. Feb. 22, 2005), we invite supplemental briefing as follows.

If defendant is seeking a remand to the district court for resentencing in light of *Booker* and *Antonakopoulos,* defendant is directed to file and serve a supplemental brief, not to exceed 15 pages, within 10 calendar days of this order, in compliance with applicable rules concerning briefing, and addressing the following issues:

1. The brief should indicate, with references to the record, whether and, if so, how the alleged *Booker* error

was preserved below. *See Antonakopoulos,* 2005 WL 407365, at *6.

2. If the error was not preserved below or there is a dispute about whether the error was preserved, defendant should specify, in accordance with the standards set forth in *Antonakopoulos,* the circumstances warranting a remand including in particular those creating a reasonable probability that the district court would impose a more favorable sentence under non-mandatory Guidelines and other applicable factors. If the error was preserved below, the defendant shall explain why the error was not harmless.

3. The government shall file a response, in compliance with the applicable rules, not to exceed 15 pages, within 10 calendar days of service of the defendant's supplemental brief. If the government concedes that the alleged error was preserved below but does not concede that the sentence should be vacated and remanded, the government should demonstrate why the alleged error was harmless.

4. In both filings, citations to the record should be included where possible. The defendant's brief is free to proffer pertinent facts not in the record and the government is free to counter proffer, if defendant contends he was precluded from such a proffer under a mandatory guidelines regime. This invitation is without prejudice to a decision by the panel as to what significance should be attached to such proffers.

By The Court:
Richard Cushing Donovan, Clerk

By: MARGARET CARTER
Chief Deputy Clerk

cc: Dina Michael Chaitowitz, AUSA
Michael K. Loucks, AUSA
Susan G. Winkler, AUSA
Gary S. Katzmann, AUSA
Virginia M. Vander Jagt, AUSA
Joseph P. Russoniello
Matthew D. Brown
Miriam Conrad, AFPD
Owen S. Walker, FPD

543 U.S. 1097, 125 S.Ct. 984

Supreme Court of the United States
William THURSTON, petitioner,
v.
UNITED STATES.
No. 03-1670.

Jan. 24, 2005.

On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

United States Court of Appeals
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,

Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,

Defendant, Appellee/Cross-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, *Senior U.S. District Judge*]

Before

Lynch, Lipez, and Howard, *Circuit Judges*.

Michael K. Loucks, Assistant U.S. Attorney, with whom *Michael J. Sullivan*, U.S. Attorney, and *Susan G. Winkler* and *Gary S. Katzmann*, Assistant U.S. Attorneys, were on brief, for appellant.

Matthew D. Brown, with whom *Joseph P. Russoniello* and *Cooley Godward LLP* were on brief, for appellee.

February 4, 2004

LYNCH, *Circuit Judge*. William Thurston, a vice president of Damon Clinical Testing Laboratories, Inc., appeals his conviction for conspiring to defraud the Medicare program of over five million dollars.[1] The charged conspiracy involved the manipulation of physicians into ordering unnecessary ferritin blood tests[2] for Medicare beneficiaries in violation of 18 U.S.C. § 371.

The essence of the scheme charged was that Damon, through Thurston and others, bundled the ferritin blood test – previously ordered by doctors less than two percent of the time – into a panel of blood tests known as the LabScan, which was ordered thirty to forty percent of the time. When doctors or patients (instead of insurers) paid for the bundled LabScan, Damon provided the ferritin test for free, leading doctors to believe there was no extra

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[1] The original panel opinion in this case issued on August 4, 2003. Thurston then filed a petition for rehearing challenging, *inter alia*, our holding that the district court erred in granting a downward departure for good works. The Federal Defender Office and District of Massachusetts Criminal Justice Act Board filed an amicus brief in support of Thurston's petition, arguing that the panel had misconstrued the de novo review provisions contained in § 401 of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650. We asked for the government's response, which we received on November 18, 2003.

The arguments persuaded the panel that certain revisions to the original discussion of the effects of the PROTECT Act on Thurston's good works departure were appropriate. Accordingly, we have withdrawn our prior opinion and substituted this one. The discussion of the PROTECT Act is revised; the remaining portions of the original opinion are essentially unchanged.

[2] The ferritin iron test measures the number of atoms per molecule of circulating ferritin. Ferritin is a binding protein that delivers iron to iron storage cells.

charge for this test. Doctors were not told that, when Medicare paid for the bundled LabScan, Medicare was charged extra for the ferritin test. Indeed, both a letter and marketing materials indicated the added ferritin test was "free"; that is, that there was no charge beyond the standard LabScan charge. Those unnecessary ferritin tests were not free to Medicare. Damon charged Medicare roughly $21 per ferritin test on top of the approximately $24 charged for the LabScan. Nor were doctors told that the ferritin test could be ordered separately; the test requisition form did not offer that option. The physicians, then, were induced to order and to certify as medically necessary a large number of ferritin tests that were not medically necessary.

The government's theory was that Damon did this to offset Medicare's 1988 reduction in reimbursement rates of sixteen percent, which was projected to cause Damon an estimated annual loss of $800,000 in revenues. In just one of Thurston's labs, the orders for ferritin tests were expected to increase from approximately three hundred per month to roughly ten thousand per month. Thurston testified that he was innocent, and that he neither had knowledge of nor responsibility for key components of the conspiracy. The jury disagreed.

Although the sentencing guidelines called for a sentence of sixty-three to seventy-eight months, the district court sentenced Thurston to only three months' imprisonment. It did so by granting a downward departure to "correct" a perceived disparity between a five-year sentence of imprisonment for Thurston and the sentence of three years' probation given to the company president, Joseph Isola, who had pled nolo contendere and assisted the government. Its second ground for departure was its

sense that the good works Thurston did for his church and community were extraordinary.

This sentence outraged the prosecutors, who appealed, arguing that the district court lacked the power to depart downward for any of the reasons it gave, and that, even if a departure were appropriate, the extent of the departure was excessive. The government also appeals the district court's failure to impose a fine, on the basis that the sentencing guidelines, if not the statute, mandated a fine. Finally, the prosecution argues that if some departure for good works was warranted, the district court was required to address an issue it avoided: the government's request for an upward departure on the ground that Thurston had obstructed justice by committing perjury on the witness stand.

Thurston also appeals, arguing that the conviction must be vacated because the prosecution was barred by the statute of limitations, because he was entitled to a jury instruction and to acquittal on the basis that he reasonably interpreted the law to mean he could rely on the physicians' certifications of medical necessity, and because of other errors. In addition, Thurston argues that his sentence was too high because his base offense level calculation depended on an amount of loss, either actual or intended, that was unproven and excessive. Thurston also defends the downward departure.

Several important issues are raised by these appeals. The government's appeal requires us to address the effect of the new Prosecutorial Remedies and Tools Against the

Exploitation of Children Today Act of 2003 (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650,[3] on the standard that the courts of appeals use to review downward departure decisions by district judges in sentencing, as well as the availability of a downward departure for a record of good works under U.S.S.G. § 5H1.11. Thurston's appeal invites, *inter alia,* clarification of the defense doctrine concerning a defendant's reasonable interpretation of the law; the issue of when a statute of limitations defense must be raised; the ramifications of a trial judge's failure to respond to jury instructions proposed by counsel; the evidence needed to show an intended loss; and the question whether fines are mandatory.

In the end we sustain the conviction but find that the sentence was in error.

I. FACTS

We state the facts as the jury could reasonably have found them, including a fair description of the defense evidence.

A. Background

Medicare provides certain medical services and care, including clinical laboratory testing services, to persons aged sixty-five and older and to persons with disabilities. At the time of the conspiracy, Medicare was administered

[3] This Act is also known as the Amber Alert bill. It includes changes put forward in the so-called Feeney Amendment, which appears as § 401 of the Act.

by the Health Care Financing Administration (HCFA), a division of the U.S. Department of Health and Human Services. HCFA in turn contracted with private insurance companies ("carriers" and "intermediaries") to handle claims for reimbursement to Medicare program beneficiaries. By law, Medicare only reimburses clinical laboratory services if those services were medically necessary for the treatment or diagnosis of a beneficiary's illness or injury. 42 U.S.C. § 1395y(a)(1)(A) (2000); *see also* 42 C.F.R. § 424.10(a) (1988). Medicare did not generally reimburse screening tests. Medicare reimbursed one-hundred percent of the cost of necessary clinical blood tests.

Damon was, at the time, a Massachusetts corporation that provided clinical laboratory testing services to physicians, hospitals, health maintenance organizations, and their patients nationwide. Approximately thirty percent of Damon's revenues were from Medicare. Damon owned and operated a national system of clinical laboratories, and Damon was an approved Medicare provider. When Damon billed the Medicare program, it submitted to the carriers a HCFA 1500 form saying that it certified the lab tests were medically necessary. Physicians did not see those bills.

Thurston served as Regional Vice President of Damon from 1987 to 1990, and was responsible during all or part of this time for Damon's regional laboratories in Newbury Park, California; Phoenix; Chicago; and San Francisco. His office was at the Newbury Park lab; he traveled to the other labs and was in regular phone contact. Thurston was promoted to Senior Vice President of Operations in 1990. Thereafter, he relocated to the company headquarters in Needham, Massachusetts and supervised only the San Francisco lab. Another company purchased Damon in

August 1993; Thurston later switched employers and moved to Utah.

B. Theories of Prosecution and Defense

The government's theory was that the defendants tricked doctors into ordering medically unnecessary tests, for which Medicare paid. Damon added little-used tests to more popular panels of tests; it then tricked doctors by concealing that the panels could be ordered without the added tests and that Medicare was being charged for the tests. To conceal from doctors that Medicare was being charged, and to encourage doctors to order ferritin tests regardless of medical necessity, the defendants charged doctors and patients little or no extra fee for the added tests; provided literature saying that ferritin was provided free; otherwise failed to disclose to doctors the cost to Medicare of the expanded LabScan; and made it difficult to order the bundled test without ferritin.

The defense theories were that there was no conspiracy and, if there were, that Thurston was not a knowing participant. The defense contended that Damon complied with existing Medicare regulations, which neither prohibited bundling nor imposed a requirement on the lab to disregard a physician's certification that tests were medically necessary. It further argued that even if Thurston's interpretation of the regulations was incorrect, it was objectively reasonable, and so Thurston lacked the required criminal intent. Thurston's defense was also that any fraud was carried out by his subordinates, without his knowledge. He testified that he did not instruct the labs to add ferritin; did not authorize or condone any decision to forego a fee increase for doctors or private-pay patients on

the expanded LabScan; did not instruct subordinates to conceal that doctors could order a LabScan without ferritin; and had nothing to do with requisition forms or particular pieces of marketing literature.

C. Evidence of Conspiracy to Defraud

1. Addition of Ferritin

In late 1987, HCFA announced that effective April 1, 1988, Medicare would reduce by almost sixteen percent the fees paid to laboratories, including Damon, for providing clinical laboratory services to beneficiaries. If Damon maintained its existing practices and fee structure, then Damon would lose $800,000 in revenues during the first year alone, as Thurston knew. Of that amount, more than $500,000 of the annual losses would occur at Thurston's four regional laboratories.

There were corporate discussions, which included Thurston, about how to offset this loss. As a result, Damon added its ferritin test to the LabScan, a panel of more than a dozen blood chemistry tests performed by a single machine on one blood sample. The ferritin test was performed on separate equipment. Damon bundled ferritin with the LabScan from 1988 to at least mid 1993. The LabScan had been requested on at least thirty-five to forty percent of the orders submitted to Thurston's regional laboratories. By contrast, doctors rarely ordered the ferritin test. The general manager of one of the laboratories Thurston oversaw estimated that only one to two percent of the orders for blood tests included a request for a ferritin test.

Nothing in the medical literature at the time showed ferritin was necessary for all persons receiving LabScans.

Indeed, it was not. A family practitioner testified that he needed ferritin less than ten percent of the time it was included as part of the LabScan. Similarly, an internist testified that he needed the ferritin test for very few of his Medicare patients.

The plan to add ferritin to the LabScan was discussed at a general managers meeting in January 1988 and at a mid-year financial meeting for the western region in March 1988. Thurston attended both meetings. In late March, Thurston personally approved the addition of ferritin to the LabScans offered by the Newbury Park, San Francisco, and Phoenix labs.[4] Thurston initially acquiesced when the Phoenix lab sought permission not to add ferritin; in August 1988, however, after Thurston saw the financial results from the addition of ferritin at his other labs, Thurston ordered the Phoenix lab to add the test to the LabScan.

Thurston presented evidence that the decision to add ferritin was made at a lower level for legitimate reasons. Thurston and Isola testified that at the general managers meeting in early 1988, management decided to allow individual laboratories to determine whether to add ferritin to the LabScan. There was also testimony that Damon's sales force made requests to the sales managers

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[4] There was abundant evidence that Thurston instructed his subordinates to add ferritin. For example, the general manager of the Chicago lab had contemporaneous notes of a conversation with Thurston in 1988 indicating that Thurston told him to add ferritin to the LabScan. The manager of the San Francisco lab also testified that Thurston called him and told him to add the ferritin test to the LabScan.

and general managers of individual labs to add ferritin to the LabScan, on the grounds that the new test would make the panel more competitive.

2. Differential Charging for Ferritin Test

(a) Thurston's Knowledge of Price Differential

Medicare provided one reimbursement for the ferritin test and a separate reimbursement for the LabScan panel. In 1988, for example, Medicare paid $24.05 for a LabScan and $20.86 for a ferritin test.

Thurston's labs submitted to him capital expenditure requests (CERs) to help with the decision whether to bundle the tests. CERs were financial projections comparing the additional revenues (from Medicare reimbursements) and costs (partly from the purchase of new equipment) that would result from the addition of ferritin to the LabScan.[5] These CERs assumed there would be no increase in the charge to doctors and patients for a LabScan with ferritin. Thurston discussed and then signed the CERs. They projected losses of revenue from doctors and patients (who would receive free ferritin tests) and massive increases in revenue from Medicare reimbursements. One lab, for example, projected that the number of ferritin tests performed for Medicare beneficiaries would grow from 25 per month to 1,946 per month – increasing revenues by $10,308 per month. Overall, Thurston's labs

[5] The defense argues that the CERs were prepared for the related purpose of justifying, to Damon executives, the purchase of equipment to carry out a higher volume of ferritin tests.

projected that they would increase their Medicare reimbursements by approximately $1.16 million per year by adding ferritin to the LabScan; if multiplied by five years, this increase would be $5.8 million. The capital expenditure requests were best-case projections, assuming that every doctor who would otherwise have ordered a LabScan without ferritin would now order a LabScan with ferritin.

Damon sought reimbursement (at different rates) for ferritin tests from Medicare, CHAMPUS,[6] and other insurers, but provided them for free to doctors and patients. Thurston said he was unaware doctors were not being charged. But Thurston approved the decision by a number of his labs to adopt this policy of differential pricing depending on the client, and the CERs assumed no price increase for doctors and patients. Thurston instructed a subordinate to add ferritin at no charge to doctors; Thurston was present at a meeting in which another executive announced the no-charge policy; and Thurston received a memo saying that there was no price increase for doctors at a lab he oversaw. Witnesses testified that physicians are highly price-sensitive about charges for lab work and might object to the automatic inclusion of ferritin unless the test were provided for free. At least initially, many or all of Thurston's labs increased the charge to private insurance companies for a LabScan based on the addition of ferritin. However, any price

[6] CHAMPUS is the Civilian Health and Medical Program of the Uniformed Services, a health benefit and insurance program for dependants of military personnel that is administered by the Department of Defense.

increase for private insurers on the expanded LabScan was much smaller than the cost increase to Medicare.

Thurston presented evidence that two of his labs did increase the price for physicians; that this price increase provoked complaints by doctors; that he was informed of these complaints; and that he responded that doctors could not obtain a LabScan with ferritin unless they paid the higher price. He also presented evidence that the no-charge approach was a deviation from corporate policy and was initiated by the heads of individual labs; that he did not find out about any price differential until years after it had been implemented; and that he sought to correct any price differential as soon as he discovered it. Thurston testified that he did not authorize, condone, or ratify a decision not to increase the price of the LabScan based on the addition of ferritin.

(b) Concealing Price Differential from Doctors

Thurston's labs took steps to conceal from doctors that, in addition to the LabScan charge, Medicare would pay an extra fee for the ferritin tests. No letters were sent to doctors advising them that Medicare would be charged separately for the ferritin test. To the contrary, in April and May 1988, letters were sent to physicians notifying them that the ferritin test was going to be automatically added at "no extra cost." In Newbury Park, stickers were also printed and added to physicians' brochures and directories saying, "Ferritin Automatically Included at No Charge." Of course, as to Medicare patients, these statements were untrue.

Thurston testified that he did not pre-approve the letters or stickers saying ferritin would be provided free to customers. Thurston portrayed himself as a hands-off manager who trusted subordinates to build in a charge to physicians and to accurately promote the expanded LabScan.

Several physicians testified they were initially unaware that Damon charged Medicare for the ferritin component of the expanded LabScan. A number of Damon customers protested, and even switched labs, when they belatedly discovered Damon was charging Medicare for ferritin tests conducted as part of the LabScan. When doctors told Damon sales representatives that they did not need the additional test, some were told that a LabScan without ferritin would cost more than a LabScan with ferritin. A major client referred Damon to a newspaper article criticizing the practice of bundling tests into panels and profiles, and warned Damon that its failure to educate doctors about the composition of and alternatives to its panels would subject it to ongoing criticism. Thurston was informed of these complaints, which were written up in monthly management reports he received in 1989 and 1990. Despite these complaints, Thurston did not cause a letter to be sent to doctors informing them of the extra charge for ferritin to Medicare.

Damon also collaborated with HMOs operating on a capitation basis (i.e., paying a flat monthly fee for each HMO member) to reduce utilization of bundled tests such as the LabScan. For example, one of Thurston's labs added to its HMO requisition form a checkbox for a LabScan without ferritin. Damon made no such effort to assist Medicare.

3. Availability of LabScan Without Ferritin

Thurston instructed subordinates to take specific steps that hid the fact that the LabScan could be ordered without ferritin and made it difficult for doctors to order the LabScan separately. For example, Thurston told the general manager of the Newbury Park lab not to advertise or promote the fact that doctors could still order a LabScan without ferritin. Similarly, Thurston helped make the decision to omit, from the Newbury Park letter announcing to doctors the addition of ferritin to the LabScan, the test code for ordering a LabScan without ferritin. The standard requisition forms used by Thurston's labs did not change following the addition of ferritin to the LabScan; there was a checkbox for the "LabScan" (which now included ferritin) but no box for the "LabScan without ferritin" or the "LabScan with ferritin."

During the conspiracy period, there were at least two ways for doctors to order the LabScan without ferritin. They could handwrite such an order on a standard requisition form, or they could request and obtain a customized requisition form with a checkbox for the LabScan without ferritin. A number of doctors and institutions took advantage of these options.

Thurston testified that he did not tell anyone to conceal or refrain from advertising that the LabScan could be ordered without ferritin. There was testimony that, after Thurston learned in 1991 that the front of a requisition form used by one of his labs did not disclose the inclusion of ferritin in the LabScan, he instructed a subordinate to list it on the front and the form was so amended.

4. Apolipoprotein

Damon also added an apolipoprotein test to its coronary risk panel in 1989. Before apolipoprotein was added to the panel, clients ordered it very rarely. The standard requisition forms Damon used after adding apolipoprotein to the panel also did not offer a checkbox for a coronary risk panel without apolipoprotein. Following the addition of apolipoprotein, the cost to doctors of the coronary risk panel increased by five dollars. Medicare reimbursed apolipoprotein separately at a rate well above five dollars. Thurston participated in the decisions about the addition, the requisition forms for, and the extra charges for apolipoprotein.

D. Thurston's "Reasonable Interpretation" as Evidence of Lack of Criminal Intent

Thurston presented evidence that from 1988 to 1993 it was an industry-wide practice for labs to rely on the doctors who ordered tests to make determinations of medical necessity. Because, prior to 1994, doctors did not normally share their diagnoses with labs, labs did not have the information required to gauge medical necessity. Damon employees did not believe that they certified tests as medically necessary when they submitted HCFA 1500 forms with Medicare bills. Instead, they believed it was the doctors who ordered LabScans who made the certification.

Two expert witnesses testified that it was appropriate in 1988 to include ferritin in a blood chemistry panel. The bundling of different tests into panels was lawful under Medicare regulations. There was testimony that technological changes during the 1980s made it possible to

automate the ferritin test, which presumably made it much cheaper to conduct. Witnesses for both sides testified that by 1988 some of Damon's competitors offered ferritin as part of their blood chemistry panel and so Damon added the test to stay competitive.

II. PROCEDURAL HISTORY

A. Indictment and Trial

On January 22, 1998, a thirty-nine paragraph single-count indictment charged Thurston and three other former Damon executives – Joseph Isola, Beno Kon, and Gerald Cullen – with conspiring to defraud HCFA in violation of 18 U.S.C. § 371[7] by causing doctors to order unnecessary tests by adding a test for ferritin to a pre-existing panel of diagnostic blood tests, and by adding a test for apolipoproteins to a profile used to assess coronary artery disease. The conspiracy period was from July 1987 to August 1993.

Isola, President of Damon, pled no contest and, pursuant to his plea agreement, was sentenced to three years' probation and a one-hundred dollar special assessment. Kon, Corporate Controller, died during the proceedings. Cullen, Senior Vice President for Operations, was tried before the district court in October 2001 and acquitted at the close of the government's evidence. In addition, Damon pled guilty on October 11, 1996 to conspiracy to defraud by bundling ferritin with the LabScan and apolipoprotein with the cardiac risk panel. The company was

[7] Damon was separately indicted for conspiracy to defraud HCFA, on the basis of the same events.

sentenced to pay a $35,273,141 fine, and later entered into a civil settlement under which it paid the United States and the state Medicaid programs an additional $83,756,904.

Thurston was tried before a jury in November and December 2001. The trial lasted three weeks. At the close of the government's evidence, the district court granted Thurston's motion for judgment of acquittal as to the indictment's apolipoprotein allegations, ordered these allegations stricken, and explained to the jury that only the ferritin allegations remained. The jury found Thurston guilty. Thurston's subsequent motions for judgment of acquittal and for a new trial were denied. The procedural rulings at trial that Thurston attacks are described below.

B. Sentencing

The district court sentenced Thurston to three months' imprisonment (with a judicial recommendation that the term be served in a halfway house), followed by twenty-four months of supervised release (of which the first three months were to be served in home detention). The court imposed a one-hundred dollar special assessment and no fine. The Pre-Sentence Report (PSR) had recommended a Total Offense Level of twenty-six and a Criminal History Category of one. The PSR identified the base offense level as six. It recommended a fourteen-level upward enhancement for an intended loss of at least five million dollars; a two-level enhancement for more than minimal planning; and a four-level enhancement for a leadership role. It also suggested that an enhancement for obstruction of justice was appropriate, on the grounds that

Thurston perjured himself at his trial. The PSR recommended the statutory maximum term of sixty months' imprisonment and noted that both the statute and the guideline allowed for a fine. It calculated that Thurston had a net worth of $1,526,904.

The defense contested the PSR's recommendations. Thurston requested a three-level decrease because the substantive offense of defrauding the United States was incomplete; a four-level decrease because Thurston was a minimal participant; and a two-level decrease for acceptance of responsibility. Thurston requested a downward departure on the grounds that he had an extraordinary record of charitable work and community service; that the offense constituted aberrant behavior; and that there was the potential for a large disparity with Isola's sentence.

The government argued that Thurston should receive a two-level upward enhancement for obstruction of justice. Otherwise, it accepted the recommendations of the PSR. The parties agreed that any restitution had been made by Damon, the corporate defendant.

The district court sentenced Thurston at a hearing on June 26, 2002 to three months' imprisonment, a period of supervised release, and no fine. The district court granted a fourteen-level enhancement for the size of the intended loss, *see* U.S.S.G. § 2F1.1(b)(0) (1992 version),[8] a four-level

[8] U.S.S.G. § 2F1.1 was deleted by consolidation with U.S.S.G. § 2B1.1 effective November 1, 2001. *See United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77 n.3 (1st Cir. 2002). Under the current guidelines, a loss exceeding $2.5 million warrants an *eighteen*-level upward enhancement. U.S.S.G. § 2B1.1(b)(1). When the guidelines in effect at the time of sentencing are more stringent than those in effect at the

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enhancement for an aggravated role in the offense, *see* U.S.S.G. § 3B1.1(a) (1992 version), and a two-level enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2) (1992 version). The court did not explicitly rule on the government's request for an obstruction of justice enhancement, *see* U.S.S.G. § 3C1.1 (1992 version), or Thurston's request for a three-level decrease for failure to show completion of the substantive offense, *see* § 2X1.1 (1992 version). Thurston's adjusted offense level of twenty-six and criminal history category of one yielded a guidelines sentencing range of sixty-three to seventy-eight months' imprisonment; this range was trumped by the statutory maximum of sixty months for a violation of 18 U.S.C. § 371.

During the hearing, the government confirmed that Thurston had been offered (and had rejected) a plea agreement "along the lines" of the one that Isola had accepted. Over the government's objections and arguments, the district court then departed downward on the basis of Thurston's record of charitable work and community service and the disparity between Thurston's and Isola's sentences. The court then solicited the government's recommendation about the extent of the departure. The government responded that, if the court chose to depart, then it should depart no further than the sentencing guidelines for a perjury conviction, which would be an offense level of twenty (six less than that of the underlying

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time of the offense, the latter are normally used, partly to avoid any hint of an ex post facto increase in penalty. *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (citing *United States v. Harotunian*, 920 F.2d 1040, 1041-42 (1st Cir. 1990)).

offense), for a sentencing range of thirty-three to forty-one months' imprisonment. The court then departed by at least sixteen levels.

The government appealed the sentence and Thurston appealed his conviction and sentence.

III. THURSTON'S APPEAL FROM HIS CONVICTION

Thurston was convicted under 18 U.S.C. § 371, which provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

A. Statute of Limitations

Thurston argues that the trial court erred in not granting his post-verdict Rule 29 motion for acquittal, because the government had not proved an overt act during the limitations period, and in not sua sponte instructing the jury on the statute of limitations.

The statute of limitations for 18 U.S.C. § 371 crimes is the general five-year statute of limitations contained in 18 U.S.C. § 3282. Here, that five years ran back from January 22, 1998, the date of the indictment, less the six weeks during which Thurston agreed to toll the limitations period. The government, therefore, had to prove an overt

act was done on or after December 11, 1992. The indictment properly alleged at least eight overt acts within the limitations period.

Thurston did not raise the defense of statute of limitations either before or at trial, did not request an instruction on the defense, and did not object when the judge instructed without addressing the issue. Thurston first raised the issue by Rule 29 motion after the verdict. The government says Thurston raised the issue too late. There is a preliminary question of when such a motion should be raised, a question affecting our standard of review.

"The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . ." *Biddinger v. Comm'r of Police*, 245 U.S. 128, 135 (1917). Here the indictment adequately pled facts to establish that the crime was within the limitations period. Thurston was not required to raise the defense before trial under Rule 12(b)(3), Fed. R. Crim P. Nor would it have made sense for him to do so, since the defense depended on what the government proved or failed to prove at trial. In a criminal case a defendant need only plead as to the accusation of guilt in the indictment and need not raise the statute of limitations as an affirmative defense before trial.[9] Thurston mistakes these truisms for an argument that he need not raise the limitations defense at all before the jury delivers a verdict of guilt.

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[9] By contrast, in a civil case, a defense of statute of limitations must be raised in an answer or it is lost. Fed. R. Civ. P. 8(c); *In re Cumberland Farms, Inc.*, 284 F.3d 216, 225-27 (1st Cir. 2002).

The government says Thurston has waived[10] the issue and may not raise it at all. Absent an explicit agreement to waive the defense, we treat the issue as a forfeiture and not a waiver, contrary to the government's argument. This was not an intentional relinquishment or abandonment of a known right, the definition of a waiver. The issue of failure to assert the defense was viewed as forfeiture in *United States v. O'Bryant*, 998 F.2d 21, 23 n.1 (1st Cir. 1993). The rule we use – that the defense of statute of limitations must be raised at trial and, if not, is forfeited but not waived – is the rule in most circuits. *See United States v. Ross*, 77 F.3d 1525, 1536 (7th Cir. 1996) ("[I]t is widely accepted that a statute of limitations defense is forfeited if not raised at the trial itself.") (citing cases).

Thurston has indeed forfeited[11] the defense that the government did not prove facts that an overt act occurred within the limitations period. The defense should have been raised at trial. Waiting until after the jury has rendered a verdict of guilt to raise a limitations defense for the first time is inconsistent with the characterization of

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[10] A defendant may waive the defense of statute of limitations by several means, including by entry of plea of guilty, *see Acevedo-Ramos v. United States*, 961 F.2d 305, 308 (1st Cir. 1992), or by a voluntary agreement, usually written, such as in a tolling agreement, *see United States v. Spector*, 55 F.3d 22, 24 (1st Cir. 1995). None of these situations is present here.

[11] Our reasoning that the argument has been forfeited would be different if compliance with the limitations period were either jurisdictional or an element of the offense that the government had the burden of proving. Here, when the limitations defense is not an issue of law but is based on facts to be proven, the defense must be raised at trial at the latest.

the statute of limitations as an affirmative defense and would unfairly sandbag the government.

Because this was a forfeiture and not a waiver, there is still plain error review available under Fed. R. Crim. P. 52. *See United States v. Olano*, 507 U.S. 725, 731-32 (1993). Our conclusion is straightforward. The government's evidence established overt acts by the conspirators within the limitations period, so there was no error at all as to the statute of limitations, much less plain error.

The government showed that labs overseen by Thurston (and his co-conspirators) submitted tens of thousands of reimbursement claims to Medicare after December 11, 1992 for ferritin tests conducted as part of LabScan orders. The government also presented ample evidence that many of these tests were medically unnecessary and were submitted by doctors unaware that Medicare would be charged separately for ferritin.[12] It was not credible that the ferritin test, ordered less than two percent of the time, suddenly became medically necessary thirty to forty percent of the time within the life span of the conspiracy.

Thurston also argues he was entitled to a jury instruction on the limitations point. By failing to request a jury

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[12] For example, government witness Dr. Johnson testified that he ordered the LabScan regularly for Medicare patients; rarely needed a ferritin test; and, when he discovered that Damon charged Medicare separately for ferritin, demanded that ferritin be removed from panels he ordered. As demonstrated by a lab report the defense introduced into evidence, Dr. Johnson continued ordering the LabScan with ferritin for Medicare patients through mid-1993.

instruction and failing to object to the lack of an instruction, he has forfeited the argument. Fed. R. Crim. P. 30; *see United States v. Gallant*, 306 F.3d 1181, 1187 (1st Cir. 2002) ("[A] party unhappy with a trial court's jury instruction [must] promptly state the precise objection after the instruction has been given."). As there was no error, the plain error standard was not met. *See* Fed. R. Crim. P. 30, 52(b).

B. Purported Lack of Criminal Intent and the Requested Reasonable Interpretation Instruction

Procedurally, the issue of reasonable interpretation comes up in two ways: denial of Thurston's Rule 29 motions and denial of his request for a jury instruction. Thurston's three Rule 29 motions – at the end of the government's case, at the end of the defense case, and after the verdict – all argued that he lacked the needed criminal intent. Our review is of whether a rational fact finder could conclude, beyond a reasonable doubt, that the government proved the elements of the crime, including intent. *United States v. Moran*, 312 F.3d 480, 487 (1st Cir. 2002). Thurston also requested a jury instruction on reasonable interpretation of the law[13] and preserved his objection to the court's rejection of the instruction.

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[13] The instruction he requested stated in part:

> Mr. Thurston contends that an independent clinical laboratory does not violate any aspect of Medicare law in providing physicians with a profile or panel that contains a serum ferritin test, so long as the physician is given reliable

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Thurston argued he reasonably interpreted the law as requiring that the treating physician, not the test lab, certify to the HCFA that the test ordered was medically necessary and reasonable, and that he and the company were entitled to rely on that physician certification. Specifically, Thurston contended that in the relevant time period an independent clinical lab did not violate any aspect of Medicare law by: (1) providing physicians with a panel containing a ferritin test, so long as the physician was given reliable and accurate information about the test and could select the panel without the test; or (2) submitting a reimbursement claim, using a HCFA form or otherwise, so long as a physician ordered the test performed. This is one of his primary arguments on appeal.

Whether a particular defense doctrine is germane depends on the crime charged and the facts of the case. This is where Thurston's argument falters. He argues that

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and accurate information about the test and the choice to select the profile or panel with or without the added test.

Mr. Thurston also contends that an independent clinical laboratory does not violate any aspect of Medicare law in submitting a claim for reimbursement, using a HCFA form or otherwise, so long as the blood tests performed were ordered by a physician.

I instruct you as a matter of law that these are reasonable interpretations of the Medicare statutes, regulations and rules.

In order for you to find Mr. Thurston guilty on the basis that he caused physicians to order medically unnecessary tests for their patients, the government must prove beyond a reasonable doubt that these were not Mr. Thurston's interpretations of the pertinent Medicare laws.

he could not have had the needed intent because employees of clinical labs, including Thurston, "were unaware that they were actually certifying the medical necessity of each test performed for every patient" and they could reasonably interpret the law to mean that the treating physician, not the laboratory, made the certification. The argument is beside the point.[14]

Thurston was not charged with making a false statement to the United States, the falsity of which turned on an ambiguity in what the law required. Nor was he charged with failing to make a statement required by law in a situation of parallel ambiguity. He was not charged with falsely certifying the medical necessity of the tests ordered. He was charged with the crime of conspiracy to defraud the United States by inducing physicians through deceit and trickery into certifying tests as medically necessary when the ferritin tests were not necessary, thus leading Medicare to pay for unnecessary services.

Thurston's knowledge of the Medicare regulations and of the fact that the ordering physicians would certify the medical necessity of the tests was, ironically, part of the proof of the crime, not a defense. Thurston cannot, under 18 U.S.C. § 371, knowingly conspire to mislead and manipulate doctors into certifying medically unnecessary tests which led to improper payment of Medicare funds and then defend on the basis that he committed no fraud

[14] Thurston argues it would be nonsensical to ask clinical testing laboratories to guarantee that a test ordered by a doctor was in fact medically necessary. That question simply is not raised here.

because the doctors, not he, were the ones who certified the tests as necessary.

Thurston's reliance on *United States v. Prigmore,* 243 F.3d 1 (1st Cir. 2001), is misplaced. *Prigmore* is part of a line of cases charging false statements or failure to make required statements, holding that intent should be measured against an objectively reasonable understanding of the legal requirements to be met, and that a statement is not in fact false or fraudulent if it is based on an objectively reasonable interpretation of that legal requirement. *See id.* at 17-18. This court first applied this principle in *United States v. Rowe,* 144 F.3d 15, 21-23 (1st Cir. 1998), to a statement that was not in fact false under an objectively reasonable interpretation of a disclosure requirement. In *Prigmore,* the conspiracy charged was to defraud and impair the functioning of the Food and Drug Administration, in connection with its oversight and regulation of medical devices, through failure to file reports which were required under certain conditions. The fraud alleged was the failure to submit a pre-market approval information supplement to the FDA, but whether such a supplement was required depended on the interpretation of certain regulations. The same conditional requirement was true of certain testing reports. The question was whether defendants could objectively and reasonably understand one regulatory phrase, "affecting the safety or effectiveness of the device," as being circumscribed by another regulatory phrase, "intended . . . conditions of use." *See* 243 F.3d at 15.

No similar question was presented here. Here, the underlying crime was one of manipulating doctors into making false certifications so Damon could receive unwarranted Medicare payments. There is no material question

about ambiguity in the underlying legal requirements and no germane question about the meaning of the law. There was also no issue of lack of fair notice of what the law requires, a concern underlying the *Prigmore/Rowe* line of cases. A reasonable person knows it is wrong to trick others into doing something wrong that one does not do directly oneself, especially in order to obtain personal gain. The *Prigmore* doctrine has no application given the crimes charged and the facts involved. Because the nature of the crime charged made the reasonable interpretation doctrine irrelevant, the jury instruction issue disappears.

C. Failure of District Court to Respond To Requested Instructions

Thurston argues that the district court violated Rule 30, Fed. R. Crim. P., which provides:

> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.
>
> (b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

Thurston is correct: the district court failed to inform the parties of how it intended to rule on each of the requested instructions before closing arguments, as required by the rule.

A description of the interactions of court and counsel sets the stage. Each side submitted extensive requests for instructions, and there were disagreements.[15] The court did resolve the most serious disputes over some of the instructions (for instance, on the reasonable interpretation/*Prigmore* question) and told counsel these rulings before closing argument. The court did not, though, review all of the requests. Thurston's counsel did not object to this silence before giving his closing.

Defense counsel did raise an issue after closing, and before the jury was instructed, that he wanted to put on record his specific objections to the government's requests. He did not say he had been prejudiced in any way by the court's failure to rule on the requested instructions before he gave his closing. The court replied that it would neither rule on nor hear argument on the proposed instructions. Rather, the court stated its understanding that the appropriate time to object was at the end of the instructions. Nonetheless, it did hear argument on the government's Request No. 8 (the compelled witness rule), and declined to give the instruction. It also heard argument on the government's proposed instructions No. 18 (conspiracy);

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[15] As examples of disagreements, Thurston gives the following. The government filed objections to Thurston's requested instructions concerning character evidence and reputation (No. 7); Thurston's status as vice-president (No. 10); the definition of "knowingly" (No. 16); the definition of "willfully" (No. 17); proof of specific intent to participate (No. 18); the definition of "overt act" (No. 21); the good-faith defense (No. 22); and Thurston's reasonable interpretation of Medicare laws (No. 23). Counsel for Thurston objected to three of the government's requested instructions, each of which concerned an element of the offense: conspiracy (No. 18); unlawful objectives (No. 19); and overt acts (No. 22).

No. 19 (unlawful objectives); and No. 22 (overt act). The only proposed defense instruction called to the court's attention was No. 24, on missing witnesses.

The district court did not, as Rule 30 requires, tell counsel before closing argument its disposition of all of the requested instructions. But counsel for Thurston had an obligation to bring this to the court's attention before the closing and did not do so.

Without addressing the issue of whether Thurston has thus forfeited the Rule 30 argument, we choose to simply evaluate whether defense counsel's closing argument was adversely affected. *See United States v. Owens*, 167 F.3d 739, 753 (1st Cir. 1999). It was not. One telling indicium that there was no prejudice is that trial counsel did not ever say to the court he would be prejudiced if he had to proceed with his closing without knowing the court's disposition of the remaining requested instructions.

An even more telling indicium of lack of prejudice is that Thurston's appellate counsel has been unable to identify any specific areas of prejudice occasioned by the trial court's lapse. While in theory such a lapse could cause prejudice, the most that is argued here is that there was "no detailed reference to important legal concepts regarding criminal conspiracy and the state of mind by which Thurston would be judged." Appellate counsel does not identify those "important legal concepts," and we see none. As to Thurston's state of mind, the trial judge did instruct on the government's burden to show Thurston had a specific intent to participate in the conspiracy and to defraud the United States. The court instructed the jury to consider Thurston individually to determine if he willfully joined the conspiracy. The court,

in turn, defined "willfully." The court also explicitly rejected Thurston's reasonable interpretation instruction, and it instructed on good faith. These circumstances belie any claim of prejudice and Thurston's claim fails.

D. Motion for New Trial Based on Dismissal of Apolipoprotein Charge

Thurston and his co-defendants were originally charged with conspiracy to commit fraud as to both the ferritin and the apolipoprotein tests. At the close of the government's case the court granted Thurston's motion for judgment of acquittal on the apolipoprotein test, struck those references from the indictment, and instructed the jury that this issue was no longer before it. The government did not thereafter refer to this issue.

Thurston now argues that the court should have granted Thurston a new trial after the jury returned because the apolipoprotein evidence irretrievably tainted the trial. The government rejoins that counsel should have raised the issue sooner.

Again, we bypass the issue of forfeiture and reject the argument that dismissal of the apolipoprotein charges tainted the proceedings. Thurston's argument that none of this evidence would have been admitted if the ferritin charges were tried alone is based on an unlikely premise. Where the evidence admitted as to a dismissed count would have been admissible as to a remaining count, the defendant has not suffered prejudice. *United States v. Rooney,* 37 F.3d 847, 855-56 (2d Cir. 1994) (collecting cases); *see United States v. Weiner,* 3 F.3d 17, 22 (1st Cir. 1993) (jury properly considered evidence relating to counts

dismissed prior to verdict, since evidence was relevant to remaining counts).

The government would have introduced such evidence in any event as relevant to rebut central defense themes that, because Damon had such a decentralized decision-making structure, Thurston was not involved in key decisions. The apolipoprotein evidence contradicted Thurston's claims about the extent and consequences of Damon's decentralized approach to the make-up, pricing, and marketing of its panels.

There was little risk of prejudice for other reasons. The government did not mention the apolipoprotein evidence in its closing, and exhibits pertaining only to apolipoprotein were removed before the documents were submitted to the jury. Further, most of the testimony and documentary evidence in the first half of the case, before the court ruled on the Rule 29 motion, dealt with ferritin. These factors further minimized the likelihood of any taint.

Thurston's conviction is affirmed.

IV. SENTENCING APPEALS

A. Thurston's Appeal: Loss Calculation

Much of Thurston's guidelines sentence range (sixty-three to seventy-eight months) was driven by the loss calculation. Both the PSR and the government recommended an intended loss figure of more than five million dollars but less than ten million dollars. This resulted in a fourteen-level increase in the base offense level.

Thurston, not surprisingly, targets this loss calculation. He makes two arguments. The first is that the government was precluded by a comment to U.S.S.G. § 2F1.1 from ever relying on intended loss unless the government first established what the actual loss was and then established that the intended loss was greater. This is a pure issue of guidelines interpretation, which we review de novo. *See United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77 (1st Cir. 2002). The second argument is that the court's conclusion had insufficient factual support for a number of reasons, a contention reviewed for clear error.

The guidelines interpretation argument turns on a comment that provides:

> Consistent with the provisions of § 2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.

U.S.S.G. § 2F1.1, cmt. n.7 (Fraud and Deceit) (1992 version).

Thurston argues that because the government did not show actual loss, it cannot turn to intended loss. The argument is simply wrong as a matter of the wording of the comment. The comment directs the use of an intended loss figure when it is greater than the actual loss figure; the comment does not restrict the sentencing court's ability to rely on intended loss when there is no actual loss calculation available. Defendant's reading also makes little sense: it may be easier as a matter of proof to show intended loss than actual loss. Conspirators are held accountable for the loss they intend to commit. Finally, it is obvious on these facts that the intended loss was greater

than the actual loss – some doctors quit using Damon when, to their disgust, they realized what the scheme was.

Thurston next mounts a series of fact-based attacks on the intended loss figure of more than five million dollars. That figure is supported by the capital expenditure requests each of the labs prepared to obtain funding to buy the equipment needed to perform the increased ferritin testing the labs anticipated. Each CER included a financial analysis, one component of which was the estimated new revenue from bundling the tests. Thus, the intended loss calculation was based on the conspirators' own financial calculations.

Thurston argues the CERs, being mere financial projections, are not an adequate basis for an intended loss figure; that the CERs were based on an assumed best-case scenario in which no physician who ordered Labscans would decline to get ferritin tests; that, in any event, not all physicians who ordered the bundled test were tricked into doing so; that the conspiracy was not proven to last five years; that the conspiracy ended before five years had elapsed for several labs, given the different dates on which the labs bundled the tests; and that later, only one lab reported to Thurston.

A number of these are quickly dispatched. The jury verdict of guilt disposes of the question of the length of the conspiracy. Thurston's promotion out of management of three of the labs is irrelevant since he earlier conspired to produce losses intended to go on for years.

Thurston also argues that the intended loss had to be reduced under U.S.S.G. § 2X1.1(b)(2) because the government's proof did not establish that the conspirators had "completed all the acts the conspirators believed necessary

on their part for the successful completion of the substantive offense." *Id.* There is no merit to the argument. There was successful completion of the offense: the tests were bundled and doctors were misled into ordering unnecessary ferritin tests. The complaints from customers about Damon's practices were confirmation the scheme had worked.

The closer question is the degree of precision the government must reach in showing intended loss. It is true that the CERs set forth best-case scenarios which assumed all doctors would order the bundled test without culling out the ferritin test. If the CERs stood alone, defendant would have a better argument. But they are supplemented by the fact that Damon made it extremely difficult for doctors to cull out the ferritin and order the Labscan without a ferritin test.

Further, the conspirators tried to hide from doctors the fact that there was a significant cost to Medicare associated with the bundling. The conspirators were maximizing the probability that all doctors would accept the bundling, without culling and without protest. The fact that the conspirators were not entirely successful in fooling all doctors does not lessen their intent.

We have noted before that intended loss does not have to be determined with precision; the court needs only to make a reasonable estimate in light of the available information. *United States v. Blastos,* 258 F.3d 25, 30 (1st Cir. 2001). There was good evidence of intent and some "prospect of success" for the fraud to reap over five million dollars, and that is all that the case law requires. *United States v. Orlando-Figueroa,* 229 F.3d 33, 48 (1st Cir. 2000). The best-case CER projection was a loss to Medicare over

the charged five-year life of the conspiracy of $5,800,230. It was reasonable for the district court to estimate that the intended loss exceeded five million dollars, even allowing for the one to two percent normal order rate for ferritin tests. The government met its burden and Thurston offered little in rebuttal except his protestations of innocence. There was no clear error.

B. Government's Appeal

Given an intended loss of five million dollars, Thurston's crime led to the statutory maximum sentence of five years. The district court departed downward from the Guidelines range by sixteen levels, however, sentencing Thurston to three months' imprisonment to be followed by twenty-four months of supervised release. The court imposed no fine and recommended that the term of imprisonment be served in a halfway house.

1. Standard of Review: The PROTECT Act

On April 30, 2003, section 401 of the PROTECT Act became effective. That section changes the applicable standard of review for certain issues in appeals from departures from the sentencing guidelines. Section 401 amends 18 U.S.C. § 3742(e), which now provides:

> (e) *Consideration.* – Upon review of the record, the court of appeals shall determine whether the sentence –
>
> . . . .
>
> (3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c);

. . . .

. . . .

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, *except with respect to determinations under subsection (3)(A) or (3)(B),* shall give due deference to the district court's application of the guidelines to the facts. *With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.*

(emphasis added).

This changed the law. Under *Koon v. United States*, 518 U.S. 81 (1996), the courts of appeals were not to review a departure decision de novo, but were to ask whether the sentencing court abused its discretion in granting the departure. *Id.* at 91, 96-100. In appeals from sentencing departures, we had, before the PROTECT Act, engaged in a three-part review: "(1) we determine[d] whether the stated ground for departure [was] theoretically permissible under the guidelines; (2) if so, we examine[d] the record to assess whether there [was] adequate factual support; and (3) we determine[d] the appropriateness of the degree of departure." *United States v. Bogdan*, 302 F.3d 12, 16 (1st Cir. 2002). Whether the stated ground for departure was theoretically permissible – the first part – was a question of law reviewed de novo. *United States v. Bradstreet*, 207 F.3d 76, 81 (1st Cir. 2000); *see also United States v. Diaz*, 285 F.3d 92, 97-98 (1st Cir. 2002). Under *Koon*, our review under the remaining two parts was for abuse of discretion only. *See Koon*, 518 U.S. at 96-100; *United States v. Lujan*, 324 F.3d 27, 31 n.5 (1st Cir. 2003); *United States v. Martin*, 221 F.3d 52, 55 (1st Cir. 2000).

After the PROTECT Act, the statute requires de novo review not merely of the ultimate decision to depart, but also of "the district court's application of the guidelines to the facts." § 3742(e). If this court agrees that the decision to depart was justified under the guidelines, however, the *extent* of the departure granted by the district court is reviewed deferentially, just as it was prior to the PROTECT Act. *Id.; United States v. Frazier*, 340 F.3d 5, 14 n.4 (1st Cir. 2003); *see also United States v. Mallon*, 345 F.3d 943, 946 (7th Cir. 2003); *United States v. Jones*, 332 F.3d 1294, 1300 (10th Cir. 2003).

(a) Retroactivity

Thurston argues that the PROTECT Act should not be interpreted to apply to this case and that, if it does apply, it is retroactive and invalid. He makes two statutory intent arguments: (1) that the internal structure of the statute means it should not be applied to cases already pending on appeal; and (2) that the presumption against retroactivity should apply.

First, Thurston argues that Congress meant application of the de novo review provisions in the PROTECT Act to be deferred until appeals arise from sentences entered after the Act became effective. This is evident, Thurston says, since the Act imposed a new requirement for the district judge to give a *written* statement of reasons. From this, Thurston argues, all provisions of the Act were meant to apply only to post-Act sentencing. The argument is plausible, but we are unpersuaded. Even before the PROTECT Act, a trial court was required to give some reasons, though not necessarily in writing, for a downward departure. *See* 18 U.S.C. § 3553(c) (pre-PROTECT Act version); *United States v. Sclamo*, 997 F.2d 970, 973 (1st Cir. 1993) (discussing discouraged ground for departure); *United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994) (same). A requirement that this statement of reasons be written, rather than oral, has no particular connection to the appellate standard of review.

Although the Act does not expressly say that its de novo review provision applies to pending appeals, it does give an effective date of April 30, 2003. The effective date of a statute does not by itself establish that it has any application to conduct that occurred at an earlier date. *See INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (quoting *Landgraf*

v. USI Film Prods., 511 U.S. 244, 257 (1994)). Still, we agree with the Eighth Circuit that the new statute applies to appeals pending as of the effective date of the statute. *See United States v. Aguilar-Lopez*, 329 F.3d 960, 962-63 (8th Cir. 2003). Subject to constitutionally based retroactivity concerns, it is certainly within Congress's power to change a standard of review. *See, e.g., Hines v. Sec'y of Dep't of Health & Human Servs.*, 940 F.2d 1518, 1523 (Fed. Cir. 1991); *Consumers Union of U.S. v. FTC*, 801 F.2d 417 (D.C. Cir. 1986); *cf. Bierce v. Waterhouse*, 219 U.S. 320, 336-37 (1911). Much of the conduct regulated by this part of the PROTECT Act is that of the courts of appeals (and indirectly, the district courts now under closer scrutiny), and that involves conduct dating from April 30, 2003 forward.

Thurston's fall-back argument is that applying a changed standard of review to a case already on appeal would have an impermissible effect on him under the Supreme Court's retroactivity jurisprudence. *See Landgraf*, 511 U.S. at 264. Not so. The change of a standard of appellate review is one in procedure for the courts; procedural changes that do not affect substantial rights are not usually considered impermissibly retroactive. This legislation is little different than the Supreme Court's changing the standard of review by directing the courts of appeals to decide ultimate Fourth Amendment questions de novo. *Cf. Ornelas v. United States*, 517 U.S. 690, 697 (1996). The PROTECT Act's alteration of the appellate standard of review upsets no legitimate reliance interest by a defendant; it could not have induced alteration of the behavior

that led to the crime.[16] We see no unfairness to defendants in Congress's requiring a closer look by appellate courts at whether a district court committed an error in deciding that the guidelines permitted a departure. It is the substance of the sentencing rules, both in the Guidelines and in the underlying statutes, that affects defendants.[17]

(b) Separation of Powers

Thurston makes a cursory argument that the PROTECT Act presents serious constitutional separation-of-powers questions. At the request of the Senate, the Chief Justice, expressing the views of the U.S. Judicial Conference, did advise the Senate of the Conference's opposition to portions of the bill, including alteration of the standard of review. *See* Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy (undated), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Rehnquist_letter.pdf. The

[16] In Thurston's case, there could be no reliance interest in any event, since this court used a de novo standard of review at the time he committed the crime. Before *Koon* was decided in 1996, the rule in this circuit was that we would review de novo whether "taking the reasons for departure stated by the district court at face value, those reasons will as a matter of law justify abandonment of the guidelines." *United States v. Wogan*, 938 F.2d 1446, 1447 (1st Cir. 1991).

[17] Since the original panel opinion issued in this case, every other circuit to address the question has similarly held that the PROTECT Act does not have an impermissibly retroactive effect when applied to cases pending as of the Act's effective date. *See United States v. Stockton*, 349 F.3d 755, 764 n.4 (4th Cir. 2003); *United States v. Bell*, 351 F.3d 672, 674-75 (5th Cir. 2003); *United States v. Mallon*, 345 F.3d 943, 946-47 (7th Cir. 2003); *United States v. Willey*, 350 F.3d 736, 738-39 (8th Cir. 2003).

U.S. Sentencing Commission requested that Congress not act until the Commission had the opportunity to analyze data and study the matter. *See* Letter from Judge Diana Murphy, Chair of the U.S. Sentencing Commission, et al., to Senators Orrin Hatch and Patrick Leahy (April 2, 2003), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/stcg_comm_current.pdf. But judicial opposition to legislation on policy grounds is one thing; unconstitutionality is quite another. No real theory of unconstitutionality has been presented by this appeal, and so the issue is waived. See *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990).

(c) Scope of De Novo Review

A different argument was advanced in the petition for rehearing concerning the scope of de novo review under the PROTECT Act.[18] The final sentence of § 3742(e) requires the court of appeals to review de novo all determinations by the district court "under subsection (3)(A) or (3)(B)," the texts of which are set forth above. In his petition for rehearing, Thurston, ably assisted by amicus, argues that subparagraphs (3)(B)(i) and (3)(B)(ii) apply only in cases involving "unmentioned" departures, *i.e.*, departures on grounds not expressly considered by the

[18] Ordinarily, this court does not consider arguments raised for the first time in a petition for rehearing. *United States v. Bongiorno,* 110 F.3d 132, 133 (1st Cir. 1997); *Am. Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1264 (1st Cir. 1993); *Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1169 (1st Cir. 1991). Because of the importance of this issue of statutory construction, however, we bypass Thurston's failure to raise the point earlier and consider the argument on its merits.

Sentencing Commission. On this theory, because good works departures are specifically authorized (albeit discouraged) by the guidelines, this court is not authorized to ask whether, in Thurston's case, such a departure

> (i) does not advance the objectives set forth in section 3553(a)(2); or
>
> (ii) is not authorized under section 3553(b)[.]

§ 3742(e)(3)(B). Instead, the argument goes, this court is bound to accept the judgment of the Sentencing Commission that good works departures are consistent with § 3553(a)(2) and (b), and accordingly must limit its review to whether a good works departure "is not justified by the facts of the case" under subparagraph (iii).

The government's response to this argument is less than clear. The United States contends that "[n]othing in [the PROTECT Act] limits consideration of the factors in § 3553(a)(2) or the Commission's intentions as set out [in] § 3553(b)(1)[] to unmentioned departures, as *amicus curiae* argues." That statement is true as a literal matter, but it does not answer the practical question raised by amicus: whether subparagraphs (i) and (ii) permit the courts of appeals to revisit the Commission's determination that a particular ground for departure (*e.g.*, exceptional good works) comports with those provisions. The government does not directly answer that question. It does, however, strongly oppose amicus's argument that the courts of appeals are barred from considering the purposes of sentencing, the structure and purposes of the sentencing guidelines, or similar aids in evaluating the propriety of departures in particular cases.

In the end, there is less to this dispute than meets the eye. For the reasons explained below, we agree with the defense that a court of appeals, in reviewing a departure under § 3742(e)(3)(B)(i) and (ii), must accept and may not look behind the Sentencing Commission's determination that a particular categorical basis for departure is permissible or impermissible. At the same time, we agree with the government that under subparagraph (iii), a court of appeals is free to weigh the purposes of sentencing, the intentions of the Commission, and any other relevant considerations in deciding whether a particular departure is "justified by the facts of the case." This reading both reaffirms the authority of the Sentencing Commission and broadens appellate review of sentencing departures on grounds not considered by the Commission.

We start with the focus of an appellate court's inquiry under § 3742(e)(3)(B). Although most of § 3742(e) is concerned with "the sentence" actually imposed, *see* § 3742(e) (preamble), subsection (e)(3)(B) directs the court of appeals to focus on the "factor" cited by the district court as the basis for granting a departure. *See* § 3742(e)(3)(B) ("the sentence departs from the applicable guideline range *based on a factor that. . . .*" (emphasis added)). Amicus argues, and we agree, that the initial question under § 3742(e)(3)(B) is whether the district court selected a categorical basis for departure that the U.S. Sentencing Commission has considered and authorized. Because the Commission has already declared certain factors to be permissible grounds for departure, Congress could not reasonably have intended § 3742(e)(3)(B) as a warrant to second-guess the Commission's policy judgments on those matters. If, on the other hand, the district court cited as its basis for departure a factor that the Commission has

not expressly considered, then the court of appeals must make its own determinations under subparagraphs (3)(B)(i) and (ii). Where, as here, the departure was based on a factor considered by the Commission (*i.e.*, exceptional good works), de novo review extends only to whether the departure was "justified by the facts of the case." § 3742(e)(3)(B)(iii).

Implicit in this conclusion is an analysis of the word "factor" in § 3742(e)(3)(B). That term, in this context, must be read to mean a categorical basis for departure, independent of the facts of the case (for example, "good works" generally). The PROTECT Act inserted a new subsection (j) in § 3742 that forthrightly equates the term "factor" with "ground of departure."[19] In addition, the sentencing guidelines themselves, before the PROTECT Act, employed the word "factor" to refer generally to a basis for departure. *See, e.g.*, U.S.S.G. § 5K2.0 (2002) ("Grounds for Departure"). The Supreme Court adopted the same usage in *Koon*. *See, e.g.*, 518 U.S. at 98 (referring to "whether a discouraged factor nonetheless justifies departure"). Interpreting the term "factor" in § 3742(e)(3)(B) to refer to

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[19] Section 3742(j) provides:

(j) *Definitions.* – For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

a categorical basis for departure is also consistent with this court's own guidelines cases, which have frequently used the term in that way. *See, e.g., United States v. Mejia*, 309 F.3d 67, 70 (1st Cir. 2002) (referring to "factors that are either encouraged or discouraged bases for departure"); *United States v. Bogdan*, 284 F.3d 324, 328 (1st Cir. 2002) (referring to "factors that are explicitly or implicitly proscribed by the Sentencing Guidelines as bases for departure").[20]

On the other hand, there is some support for the contrary view, inherent in the government's position, that

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[20] Amicus also points to evidence in the legislative history of the PROTECT Act that Congress was troubled by departures on unmentioned grounds. Representative Tom Feeney, the sponsor of the amendment that became § 401, was particularly interested in limiting such departures. Feeney stated that under the Supreme Court's decision in *Koon*, district judges were permitted to depart downward based on "any factor not explicitly disapproved by the sentencing commission. . . . So judges can make up exceptions as they go along." 149 Cong. Rec. H2422-23 (daily ed. March 27, 2003) (statement of Rep. Feeney). At a different point, Rep. Feeney referred to a need to prevent "ad hoc departures based on vague grounds, such as 'general mitigating circumstances.'" *Id.* at H2423.

These statements certainly illuminate one of Congress's purposes in the PROTECT Act, but they do not meaningfully assist our interpretation of § 3742(e)(3)(B). Rep. Feeney's concerns about unmentioned departures are consistent with the overarching purpose of the PROTECT Act to reduce the incidence of downward departures generally. Moreover, Congress apparently rejected Rep. Feeney's initial proposal to eliminate *all* departures on unmentioned grounds. *See id.* at 2420-21. And none of the parties has cited, and we have not discovered, any legislative history addressing the specific issue here: whether Congress intended the courts of appeals to engage in de novo review under subparagraphs (i) and (ii) of § 3742(e)(3)(B) even where the ground for departure selected by the district court has been expressly approved by the Sentencing Commission.

"factor" refers not to the categorical basis for departure but to the district court's fact-specific justification for departing in a particular case. For example, 18 U.S.C. § 3553(a), which was amended by the PROTECT Act, is entitled "*Factors* to be considered in imposing a sentence" (emphasis added), and it requires district courts to take account of such case-specific matters as "the nature and circumstances of the offense and the history and characteristics of the defendant." § 3553(a)(1). Nevertheless, we are persuaded that the word "factor" in § 3742(e)(3)(B) is better understood as a shorthand for a categorical basis for departure. Congress, in enacting the PROTECT Act, plainly employed the term in that way in § 3742(j), and we hold that it intended the word to have the same meaning in § 3742(e)(3)(B).[21]

It is also apparent that Congress did not intend § 3742(e)(3)(B)(i) and (ii) as a license for the courts of appeals to second-guess the Sentencing Commission's determinations that specific factors are permissible or impermissible. In Part K of Chapter 5 of the sentencing guidelines, the Commission has identified specific mitigating and aggravating factors that, in the Commission's view, may justify departure. *See* U.S.S.G. § 5K2.0 (2002 ed.)

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[21] This interpretation is also consistent with § 3742(f), another provision amended by the PROTECT Act. That section establishes the circumstances under which the court of appeals may remand a case for re-sentencing. Subparagraph (2) addresses remands in departure cases. In language obviously intended to mirror the substance of § 3742(e)(3), it permits the court of appeals to vacate a departure and remand if "the district court failed to provide the required statement of reasons in the order of judgment and commitment, *or the departure is based on an impermissible factor,* or is to an unreasonable degree. . . ." § 3742(f)(2) (emphasis added).

("[T]his subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. . . . Presence of any such factor may warrant departure from the guidelines. . . ."). The Commission has also prohibited departures based on certain factors. *See, e.g.*, § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status); § 5K1.2 (defendant's refusal to assist authorities in investigating other persons); *see also* U.S.S.G. § 5K2.0(d) (Nov. 2003 ed.) ("Prohibited Departures"). For appellate courts to revisit such determinations anew in every case would undermine the authority of the Sentencing Commission, reduce uniformity in sentencing, and risk "recreat[ing] the location-based sentencing swings that Congress sought to minimize when it opted for a guideline paradigm." *United States v. Snyder*, 136 F.3d 65, 69 (1st Cir. 1998). Prior to the PROTECT Act, the Sentencing Commission's judgments were not open to such attacks. *See, e.g., Koon*, 518 U.S. at 95-96 (explaining that if the Commission has forbidden a particular ground of departure, "the sentencing court *cannot* use it as a basis for departure" (emphasis added)); *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, J.) (even if forbidden factors are present to such an extent that the case is outside the relevant guideline's heartland, "the sentencing court is not free to consider departing"). There is no reason to think Congress intended to change that rule.

Accordingly, we hold that where the Commission has expressly considered and forbidden or approved (even if

discouraged) a particular factor for departure, the court of appeals is bound to accept that determination and cannot revisit it under subparagraphs (i) or (ii) of § 3742(e)(3)(B).[22] So in Thurston's case, because the Commission has determined that departures based on exceptional good works are authorized, we do not inquire whether such departures comport with subparagraphs (i) or (ii), and instead proceed directly to the question whether the departure "is not justified by the facts of the case." § 3742(e)(3)(B)(iii).

There is a second component, which we do not accept, to the defense's interpretation of § 3742(e)(3)(B). Amicus argues that in evaluating whether a departure on a particular ground is "justified by the facts of the case" under subparagraph (iii), this court may not refer to the underlying purposes of sentencing, the Commission's intent in its guidelines and policy statements, or other extra-record considerations. The reason, amicus says, is the same: it is the province of the Commission to weigh such considerations, and Congress could not have intended the court of appeals to re-weigh those issues when reviewing a specific sentencing departure.

We reject this argument for several reasons. First, the PROTECT Act asks whether the departure is "justified" by

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[22] This conclusion is slightly different from amicus's position that subparagraphs (i) and (ii) simply "do not apply" to mentioned departures. There is no basis in the statute to hold those subparagraphs *inapplicable* to certain types of departures. Properly framed, the question is whether a ground for departure endorsed by the Commission can ever fail the tests set forth in § 3742(e)(3)(B)(i) and (ii). We answer that question in the negative.

the facts of the case. That calls for an evaluative judgment, not a mechanical exercise. *See* Webster's Third New Int'l Dictionary 1228 (1993) ("justify" means "to prove or show to be just, desirable, warranted, or useful"). Nothing in the statute purports to constrain the sources that the reviewing court may consider. Second, we see no serious risk that the Commission's legitimacy or authority will be undermined if a court of appeals refers to the purposes of sentencing, the goals of the guidelines, or other policy considerations in determining whether, on the facts before the court, a particular defendant fits within a particular categorical "factor."[23] Third, those considerations were a regular part of the test that Congress required of the courts of appeals under § 3742(e)(3) even prior to the PROTECT Act.[24]

Fourth, the district court not only may but *must* consider the purposes of sentencing and the Commission's relevant guidelines and policy statements when it imposes a sentence. *See* 18 U.S.C. § 3553(a); *see also id.* § 3553(b) ("In the absence of an applicable sentencing guideline, the

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[23] Hypothetically, the Commission's statutory authority could be undercut if an appellate court were to construe an approved basis for departure so narrowly that, as a practical matter, no set of facts could ever qualify. But that circumstance is extremely unlikely and, in any event, is not presented here.

[24] Before the PROTECT Act, § 3742(e)(3) simply required the court of appeals to determine whether the sentence imposed by the district court was "unreasonable" in light of, *inter alia*, "the factors to be considered in imposing a sentence." 18 U.S.C. § 3742(e)(3) (2000). Those factors, which appear in § 3553(a), include the purposes of sentencing. *See, e.g., United States v. Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (referring to the "sentencing system's purposes" in rejecting a downward departure).

court shall impose an appropriate sentence, having due regard for the purposes [of sentencing] set forth in subsection (a)(2)."). The PROTECT Act requires this court to apply de novo review under § 3742(e)(3)(B)(iii), and it would be anomalous for Congress to have required plenary review but restricted the sources of law or fact that may inform that review. Adopting amicus's interpretation would produce the counterintuitive conclusion that Congress, in expanding appellate review of departures in the PROTECT Act, simultaneously prevented the courts of appeals in some cases from reviewing aspects of the district court's reasoning. Congress could not have intended such a result.

For similar reasons, we reject the government's suggestion that we adopt bright-line rules against the consideration of certain kinds of information in our exercise of de novo review under subparagraph (3)(B)(iii). In particular, the government urges that we cannot consult district court opinions (at least to the extent not tested on appeal) or databases of sentencing decisions. Nothing in the PROTECT Act precludes us from considering such sources. To be certain, experience gained under the Act with the passage of time may show that particular kinds of information have greater or lesser value. Databases of sentencing outcomes, for example, may or may not prove pertinent, depending on their scope and the types of information they report. But we decline to adopt any mechanical rule restricting the information that the court may consider under § 3742(e)(3)(B)(iii).

(d) Deferential Review After the PROTECT Act

We also reject a final argument by the defense, said to be drawn from *Ornelas v. United States*, 517 U.S. 690 (1996), that de novo review involves deference not only to the district court's determinations of historical fact, but also to its ultimate conclusions – for example, whether a defendant's good works are "exceptional." It is true that in sentencing cases, "appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case." *United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989). We do agree that this court must defer to a sentencing court's findings of historical fact, even after the PROTECT Act. The Act did not alter the provision in § 3742(e) that the district court's findings of fact must be accepted unless clearly erroneous. *See* § 3742(e). Other circuits agree with this interpretation of the Act. *Mallon*, 345 F.3d at 946; *Jones*, 332 F.3d at 1300 n.9. Indeed, the government concedes this point. To the extent amicus suggests that the court of appeals should defer to the district court's application of the departure guidelines to the facts, however, its argument is refuted by the plain text of § 3742(e). After the PROTECT Act, that kind of deference is not ours to give.

2. The Downward Departures

The government argues that each of the stated grounds for downward departure was in error.[25] First, it contends that the district court was forbidden to depart downward based on a disparity between Thurston's sentence and the sentence of the company president, a

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[25] The court stated:

> [I]n granting the motion for downward departure, I'm basing it on two grounds.
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> First, the downward departure is justified because of the defendant Thurston's record of charitable work and community service[, which] is unique, extensive and extraordinary. I think the record should reflect that in over fourteen years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church.
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> And the second ground is that which is set out in the United States Sentencing Commission Guidelines Manual under Chapter 1, Part A, Section 3, which is entitled . . . "The Basic Approach, paren, policy statement, closed paren," setting forth the rationale of the guidelines, it's cited here that Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.
>
> Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.
>
> We have a situation here where coconspirator Isola, the president of Damon and the architect, at least the prime architect of this conspiracy, received a sentence of three years' probation, and it is, in my judgment, a violation of the fundamental purpose of the Sentencing Commission Guidelines to impose a sentence which is not at least somewhat similar to that incurred by a coconspirator who was more involved in the conspiracy t[h]an this defendant.

cooperating co-conspirator who pled guilty. Second, it argues that departures for good works are discouraged, and that the facts do not justify a finding that Thurston's good works are so exceptional as to warrant such a departure.

(a) Disparity With Co-Defendant

The district court felt there was an unfair disparity between a five-year sentence of imprisonment for Thurston and the three-year probation sentence for co-conspirator Isola. It viewed Isola as "the architect, at least the prime architect of this conspiracy." Apparently the district court felt that Isola, Thurston's superior, was the guiltier of the two, and that this fact overshadowed other differences between their cases. Isola pled nolo contendere to willful blindness about the apolipoprotein conspiracy.

As the law of this circuit makes clear, basing the departure on grounds of disparity in sentence alone between Thurston and Isola was beyond the district court's authority. *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991); *see also United States v. Romolo*, 937 F.2d 20, 25 n.5 (1st Cir. 1991). Sidestepping circuit precedent, the district court referred to a statute that requires a sentencing court to consider not only the Commission's Sentencing Guidelines and policy statements, but also "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This provision was unchanged by the PROTECT Act.

Yet the same statute also requires that the court "shall impose a sentence of the kind, and within the range [of the pertinent Guidelines], unless the court finds that

there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b)(1). That is why, since as early as 1991, this court has interpreted the statute to preclude sentencing judges from departing downward based on "a perceived need to equalize sentencing outcomes for similarly situated co-defendants, without more." *Wogan,* 938 F.2d at 1448 (emphasis added).

The "more" that is needed refers to circumstances not adequately considered by the Commission, and none have been shown here with regard to disparity. In the pre-guidelines era, the district court's attempt to avoid perceived unfairness would have had greater weight. The guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible.

(b) Good Works

The second ground, based on Thurston's good works, poses the most difficult issue in the case. We have found disparity alone an impermissible ground; it is possible the trial court would not have granted so extensive a departure based on good works alone. It may also be that if the court had granted a modest departure on the second ground, the government would not have appealed. But the trial court did not differentiate and the government on appeal argues that any departure at all based on good works (like the departure for disparity) was contrary to law.

The sentencing guidelines discourage downward departures from the normal sentencing range based on

good works – that is, civic, charitable, or public service. U.S.S.G. § 5H1.11. Such departures are permitted only when the good works are "exceptional."[28] *See* U.S.S.G. ch. 5, pt. H, introductory cmt. (departures based on discouraged factors should occur only "in exceptional cases"); *Koon*, 518 U.S. at 95; *United States* v. *Pereira*, 272 F.3d 76, 80 (1st Cir. 2001). The district court based its conclusion that Thurston's good works were exceptional on Thurston's "record of charitable work and community service[, which is] unique, extensive and extraordinary." The court continued, "I think the record should reflect that in over fourteen years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially . . . to his church." Thurston is a member of a church, tithes ten percent of his income, and devotes hours every week to unpaid service with the church in a variety of positions. Letters from his fellow congregants characterize him as a man of principle and impeccable character[27] – characterizations undermined, of course, by the jury's finding of guilt. In any

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[28] Good works may also be considered in setting a sentence within the guidelines range or in setting certain conditions. This does Thurston no good, however, since the applicable guidelines range is sixty-three to seventy-eight months, all above the statutory maximum of sixty months.

[27] During the trial, numerous witnesses for both sides testified to Thurston's reputation for honesty and integrity. During the sentencing phase, many of Thurston's friends and family members explicitly or implicitly said they thought the jury verdict was incorrect.

Good character is covered by the aberrant behavior guidelines, and there is no argument on appeal that Thurston was entitled to a departure on those grounds.

event, it is Thurston's record of good works, objectively measured, and not his good character that is at issue.

In addition to his church activities, Thurston has taken family members and others into his home and has been helpful to his neighbors. For example, the parents of a woman undergoing rehabilitation at a local medical center stayed at Thurston's home for several weeks. On another occasion, Thurston and his family laid sod for an infirm neighbor. Save for his crime, Thurston appears to have lived a creditworthy life.

The issue, however, is not whether Thurston engaged in "good works" within the meaning of § 5H1.11 – plainly he did – but whether those works were exceptional enough to overcome the judgment of the Sentencing Commission that a record of good works is a discouraged basis for departure – that is, good works are "not ordinarily relevant" to the decision whether to depart from the guidelines. § 5H1.11. We hold that a departure for good works was not justified on the facts of this case.

This circuit, even before the PROTECT Act, reversed departures based on discouraged factors where the record did not indicate that the defendant's circumstances were genuinely exceptional. For example, in *United States v. Bogdan,* 284 F.3d 324 (1st Cir. 2002), the defendant was a caring and generous father who had gone out of his way to support his ex-wife and who had expressed deep remorse for his crime. This court concluded that Bogdan's case was not so exceptional as to qualify for a downward departure based on either family responsibilities or acceptance of responsibility, both of which are discouraged factors. *See id.* at 329-30. When, on remand, the district court again

granted a downward departure because it thought Bogdan's sentence "unconscionable," this court again reversed. *See United States* v. *Bogdan,* 302 F.3d 12, 15, 16-17 (1st Cir. 2002). The *Bogdan* cases illustrate that the "exceptional case" hurdle for discouraged departures is a very high one. *See also Pereira,* 272 F.3d at 82-83 (family responsibilities departure, a discouraged factor, requires a showing of something akin to irreplaceability to qualify as exceptional); *United States v. Craven,* 239 F.3d 91, 100 (1st Cir. 2001) (departure on discouraged ground of extraordinary presentence rehabilitation requires, at a minimum, a showing of a fundamental change in attitude).

The case law under § 5H1.11 offers little guidance as to when a defendant's good works may be characterized as exceptional. What is clear, however, is that the problem is not merely one of quantity. The context of the defendant's good works is important. Here, Thurston's position as a prominent corporate executive weighs in our analysis. It is hardly surprising that a corporate executive like Thurston is better situated to make large financial contributions than someone for whom the expenses of day-to-day life are more pressing; indeed, business leaders are often expected, by virtue of their positions, to engage in civic and charitable activities. Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot. *See United States v. Morken,* 133 F.3d 628, 629-30 (8th Cir. 1998) (reversing a downward departure because the defendant's good works were not exceptional in light of his income and preeminence in a small town); *United States v. Kolbach,* 38 F.3d 832, 838-39 (6th Cir. 1994) (vacating a good works departure because "it is *usual* and *ordinary,* in the prosecution of similar white collar crimes involving

high-ranking corporate executives ... to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts" (emphasis in original)); *United States v. McHan,* 920 F.2d 244, 248 (4th Cir. 1990) (similar).

Thurston's religion plays no role in our analysis of whether his good works are exceptional. It is a neutral fact. *Cf.* § 5H1.10 (religion is "not relevant in the determination of a sentence").

The purposes of the sentencing guidelines, by contrast, are highly relevant. One of the goals of the entire guidelines regime was to minimize discrepancies in the treatment of "white collar" and "blue collar" crimes. Congress and the Sentencing Commission were clear that under the pre-guidelines regime, sentences for white collar crimes were too lenient.[28] The Commission intended its

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[28] *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002,* 34 Loy. U. Chi. L.J. 359, 372-76 (2003) (discussing the Sentencing Commission's concern that white-collar crimes have been "grossly under-sentenced"); *id.* at 396-401 (collecting data on the under-sentencing of white-collar crimes and arguing that the prevalence of downward departures in white collar cases threatens to undermine the integrity of the Sentencing Guidelines); *see also* Testimony of Sentencing Commissioner Stephen Breyer Before the Senate Committee on the Judiciary, Oct. 22, 1987, *reproduced in* 146 PLI/Crim 811, 824 (1987) ("[T]he Commission considers present sentencing practices, in which white collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair."); 28 U.S.C. § 994(m) (2000) ("The [Sentencing] Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."). The recent enactment of enhanced penalties for many white collar crimes only underscores Congress's disinclination towards leniency for white

(Continued on following page)

guidelines and policy statements to "equalize punishments for 'white collar' and 'blue collar' crime." *United States v. Rivera*, 994 F.2d 942, 955 (1st Cir. 1993) (Breyer, J.).

Against that background, the nature of Thurston's offense mitigates against concluding that his good works are "exceptional." Health care fraud is a serious crime and the federal interest in combating it is powerful. The federal government spent approximately $249 billion on Medicare in 2002. One group has estimated that about three percent of the $1.4 trillion the country spent on health care in 2001 was lost to fraud.[29] *See* "A Sick Business," *The Economist*, June 28, 2003, at 64 (citing data from National Health Care Anti-Fraud Association); *see also* National Health Care Anti-Fraud Association, *Health Care Fraud*, at 2, *available at* http://www.nhcaa.org/pdf/all_about_hcf.pdf (n.d.). Health care fraud affects the financial integrity of programs meant to aid tens of millions of people in need of health care. Every dollar lost to fraud is a dollar that could have provided medical care to the elderly or the disabled. Almost by definition, Medicare fraud is white collar fraud, most often committed by

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collar criminals. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801-1107, 116 Stat. 745, 800-10.

[29] For other circuit court cases involving Medicare and Medicaid fraud, see *United States v. Baxtonbrown-Smith*, 278 F.3d 1348 (D.C. Cir. 2002) (fraud exceeding two million dollars); *United States v. Liss*, 265 F.3d 1220 (11th Cir. 2001) (kickback scheme for referrals); *United States v. Regueiro*, 240 F.3d 1321 (11th Cir. 2001) (fraud exceeding fifteen million dollars); *United States v. McClendon*, 195 F.3d 598 (11th Cir. 1999) (fraud exceeding three million dollars); and *United States v. Polin*, 194 F.3d 863 (7th Cir. 1999) (Medicare kickback scheme).

educated people with responsible jobs. Thurston's executive position at Damon, which gave him the resources to undertake many of his charitable works, also enabled him to perform the crime. That fact seriously undercuts Thurston's claim that his good works are "exceptional" in context.

Were it not for the statutory maximum, Thurston would have been sentenced to imprisonment for more than five years under the guidelines. Thurston's good works are admirable, but considered in context, they are not so exceptional as to justify reducing the sentence for the grave crime that he committed.

The downward departure for good works is reversed.

3. Upward Departure

The government's argument that Thurston's conduct warranted an upward adjustment for obstruction of justice based on perjury at trial need not be resolved, given our disposition of the other issues. The statute caps his period of incarceration at sixty months. It is noteworthy, though, that Thurston's testimony on key matters of fact was contradicted by multiple witnesses.

4. Fine

The government argues that the sentencing judge erred by failing to impose a fine on Thurston in accordance with the guidelines. Thurston argued, and the district court accepted, that he should not receive a fine because that would create an unacceptable disparity between his

sentence and that of co-defendant Isola. Sentence disparity is an unacceptable basis for refusing to impose a fine and is plain error for the reasons discussed earlier.

Thurston contends that the government has forfeited its argument that a fine must be imposed by failing to object after the judge ruled. The government earlier took the position that a fine must be imposed and also argued that the court could not refuse to impose a fine on the basis of disparity – the only argument Thurston presented. In these circumstances, the issue was not forfeited. *See Gallant,* 306 F.3d at 1187-88 (holding that a sentencing issue was not forfeited as a result of counsel's failure to object after the court's ruling); *cf. United States v. Meserve,* 271 F.3d 314, 325 (1st Cir. 2001) (motion to strike unnecessary to preserve evidentiary issue where party objected prior to trial court's ruling). Even were this an instance of forfeiture, the district court committed plain error in its rationale.

Before this court, Thurston attempts to defend the decision not to impose a fine on the basis that the statutory definition of his crime, which provides that a fine may be assigned, trumps the guidelines, which provide that a fine must be assigned barring special circumstances. The crime of which Thurston was convicted, 18 U.S.C. § 371, provides for a prison term, a fine, or both. By contrast, U.S.S.G. § 5E1.2(a) says, "The court shall impose a fine *in all cases,* except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." (emphasis added). The defendant did not establish, or even seek to establish, inability to pay. The sentencing judge made no finding, implicit or explicit, that Thurston could not pay. The PSR estimated that Thurston had a net

worth of over $1.5 million, and the minimum fine under the guidelines was $12,500.

Because the sentence fixed by U.S.S.G. § 5E1.2(a) is within the range contemplated by 18 U.S.C. § 371, the guideline is not trumped by the statute. *See United States v. Page,* 84 F.3d 38, 43 (1st Cir. 1996) ("There is no reason why the Guidelines may not make their own classifications within the statutes, and hence definitions which the courts must observe, so long as these are not internally inconsistent or in violation of the Constitution or a federal statute."). Here, there is no inconsistency and the district court was required to impose a fine.

V. CONCLUSION

Thurston's conviction is ***affirmed***. Thurston's sentence is ***vacated;*** the downward departure based on good works and purported disparity is ***reversed;*** and the order that no fine be imposed is ***reversed***. The case is ***remanded*** for imposition of the statutory maximum sentence of sixty months in prison and for imposition of an appropriate fine. ***So ordered.***

UNITED STATES COURT OF APPEALS
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,
Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,
Defendant, Appellee/Cross-Appellant.

Before
Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez and Howard,
***Circuit Judges*.**

Order of Court
Entered: February 4, 2004

The panel opinion in this case, dated August 4, 2003, is withdrawn, and the judgment dated August 4, 2003, is vacated. A new panel opinion and judgment entered upon the docket this day. See Fed. R. App. P. 40.

Accordingly, the petition for panel rehearing and rehearing en banc, filed with the court August 28, 2003, is denied as moot.

By The Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *

UNITED STATES OF AMERICA

v. **CR. NO.: 98-10026-EFH**

WILLIAM THURSTON

* *

MEMORANDUM AND ORDER OF RECUSAL

October 2, 2003

HARRINGTON, S.D.J.

This Court sentenced Defendant Thurston, a Regional Vice-President of Damon Clinical Testing Laboratories, Inc., to a term of imprisonment of three (3) months, to be followed by a term of supervised release of twenty-four (24) months, the first three (3) months of which were to be served in home detention, after a jury convicted him on a one-count indictment of conspiring to defraud the Medicare program. The fraud charged involved the manipulation of physicians into ordering unnecessary Ferritin blood tests for Medicare beneficiaries, in violation of Title 18, United States Code, Section 371.[1]

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[1] Damon was separately indicted for conspiracy to defraud the Medicare program. The company pled guilty and was sentenced to pay a $35,273,141.00 fine and later entered into a civil settlement under which it paid the United States and the state Medicaid programs an additional $83,756,904.00. These payments constituted full restitution.

Charged with Defendant Thurston as co-conspirators were Joseph Isola, President of Damon; Beno Kon, a Vice-President of Finance; and Gerald Cullen, also a Regional Vice-President. The government offered each of the defendants a sentence of a term of probation if he were to plead guilty.

In sentencing Defendant Thurston, this Court departed downward from a sentencing guideline which called for a sentence of sixty-three (63) to seventy-eight (78) months, but the range was trumped by the statutory maximum of sixty (60) months for a violation of Title 18, United States Code, Section 371. The government recommended a term of imprisonment of sixty (60) months. The granting of a downward departure was to correct a disparity between the sentence recommended for Thurston and the sentence of three (3) years' probation given to the company President, Joseph Isola,[2] who had pled *nolo contendere*.[3] In exchange for Isola's plea, the government agreed to dismiss him from the indictment and also agreed not to appeal any sentence the court imposed. Isola's probationary sentence was imposed pursuant to his plea agreement. Thurston was offered a similar deal. A second ground for departure was that the good works Thurston did for his church and community were extraordinary.

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[2] Isola was called to testify in the government's case in chief as to Damon's formal organization and its testing procedures, but his testimony was not unfavorable to Thurston.

[3] Kon was prepared to plead guilty and be sentenced to probation as agreed to by the government, but became ill and died prior to the Rule 11 hearing, at which he was to change his plea to guilty; Cullen went to trial and was acquitted at the close of the government's evidence.

The Court of Appeals affirmed Thurston's conviction, vacated his sentence, reversed the downward departure, and remanded for imposition of the statutory maximum of sixty (60) months in prison and for imposition of an appropriate fine. *United States v. Thurston*, 338 F.3d 50 (1st Cir. 2003).

An essential objective that Congress sought to achieve in enacting the Sentencing Reform Act of 1984 was "uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." United States Sentencing Commission Guidelines Manual, p. 2 (Incorporating guideline amendments effective November 1, 2002).

When the chief architect of the scheme to defraud, President Isola, is offered by the government and receives a term of three (3) years' probation for pleading *nolo contendere* and Vice President Thurston, who is Isola's subordinate, claims that he is innocent and exercises his constitutional "right to a speedy and public trial, by an impartial jury," is to receive a term of imprisonment of five (5) years, the objective of the sentencing guidelines is absolutely annulled. The terms of three (3) years' probation and five (5) years' imprisonment constitute a "wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." The goal of "uniformity in sentencing" has utterly failed to have been achieved. Moreover, it is obvious that this "wide disparity" in sentences was precipitated by Thurston's exercise of a constitutional right. He was offered by the government and would have received a term of probation by the Court if he had been willing to forego a trial by jury and had pled guilty, as had Isola.

The Court recuses itself from this case. It is disinclined to mechanically impose a sentence, previously prescribed by the Court of Appeals,[4] which is clearly contrary to the objective of the sentencing guidelines and which severely punishes a defendant for exercising a constitutional right. The government should be prohibited from inflicting a harsh and punitive penalty on any citizen for the exercise of a fundamental right.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior
District Judge

[4] The newly granted authority given the Court of Appeals under the Protect Act, 18 U.S.C. § 3742(e), as amended, to review *de novo* a departure decision renders the trial judge superfluous and with only a nominal function at disposition. This is so notwithstanding the fact that the trial judge possesses deep understanding of the case based on knowledge acquired from presiding at two complex criminal jury trials.

United States District Court

District of Massachusetts

UNITED STATES OF AMERICA

v.

WILLIAM THURSTON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1: CR 98-10026-03-EFH

Joseph Russoniello, Esquire
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s): _____

☐ pleaded nolo contendere to counts(s)_____ which was accepted by the court.

☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 371	Conspiracy to Defraud the United States	08-00-93	1

☐ See continuation page

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on counts(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
000-00-7878

Defendant's Date of Birth:
00-00-45

Defendant's USM No.:
21941-038

Defendant's Residence Address:

10065 S. Memory Book Way
S. Jordan, UT 84095

Defendant's Mailing Address:
Same as above

June 26, 2002
Date of Imposition of Judgment

/s/ Edward F. Harrington
Signature of Judicial Officer

Edward F. Harrington, S.D.J
Name and Title of Judicial Officer

Judge, U.S. District Court
Date

June 26, 2002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 3 months *.

The court makes the following recommendations to the Bureau of Prisons: [T]HAT THE TERM BE SERVED IN A HALFWAY HOUSE AND THAT SAID HALFWAY HOUSE BE LOCATED IN ST. GEORGE, UTAH.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district.

☐ at _____ ☐ a.m.☐ p.m. on _____ .

☐ as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] ☒ before 2 p.m. on/before September 1, 2002.

☒ as notified by the United States Marshal's Office in Utah.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

[I hav]e executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 24 MONTHS [SPE]CIAL CONDITIONS OF SUPERVISED RELEASE ARE:

THE FIRST THREE MONTHS BE SERVED IN HOME DETENTION.

*

[FUR]THER, THE DEFENDANT SHALL PAY A SPECIAL ASSESSMENT OF $100.00.

☐ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

* ☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

☒ **STANDARD CONDITIONS OF SUPERVISION**

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
v.	)	CR. NO.: 98-10026-EFH
WILLIAM H. THURSTON	)	

STATEMENT OF REASONS

HARRINGTON, S.D.J.

The sentence will be imposed in accordance with the prescribed forms in the Bench Book Sec. 5.02 as follows:

3	months imprisonment with the judicial recommendation that the term be served in a halfway house and with the further judicial recommendation that said halfway house be located in St. George, Utah
_____	months/intermittent community confinement
_____	months probation
24	months supervised release**
$ _____	fine (including cost of imprisonment/ supervision)
$ _____	restitution
$ 100.00	special assessment

Other provisions of sentence: (community service, forfeiture, etc.)

**Special conditions of supervised release are:

1. Defendant is prohibited from possessing a firearm or other dangerous weapon; and
2. The first three months to be served in home detention.

Defendant Thurston is authorized to voluntarily surrender at either the U.S. Marshal's Office in Utah or at the institution designated by the Bureau of Prisons on or before September 1, 2002.

June 26, 2002
Date

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

****

UNITED STATES OF AMERICA

vs. CR. 98-10026-EFH

WILLIAM THURSTON

****

BEFORE THE HONORABLE EDWARD F. HARRINGTON
United States District Judge

Courtroom 19
1 Courthouse Way
Boston, Mass. 02210
Wednesday, June 26, 2002

APPEARANCES:

FOR THE GOVERNMENT:
Michael K. Loucks, AUSA, and
Susan G. Winkler, AUSA
U.S. Attorney's Office
United States Courthouse, Suite 9200
1 Courthouse Way
Boston, Massachusetts 02210

FOR THE DEFENDANT:
Joseph P. Russoniello, Esq. and
Matthew Brown, Esq.
Cooley, Godward, LLP.
One Maritime Plaza
San Francisco, California 94111
(415) 693-2014
Representing William Thurston

* * *

[2] THE CLERK: Criminal 98-26, United States versus William Thurston.

THE COURT: I'll hear from the government.

MR. LOUCKS: Good afternoon, Assistant Attorney Mike Loucks, with me is Assistant Attorney Susan Winkler.

The United States makes a recommendation as set forth in the sentencing memorandum that the Court sentence the defendant to 60 months incarceration, the Court make no order of restitution. The parties are in agreement that any restitution here for losses incurred was made by Damon, the defendant's prior employer, when Judge Keeton sentenced Damon in 1997, I believe it was, your Honor, '96.

We also recommend that the Court impose a special assessment that's required and that the Court impose a fine of $125,000.

I'm going to go through and I'm prepared to go through what I think are the issues in dispute. Principally, they concern, the parties agree on the base-offense level, and I think that's about it. The fiscal issues in dispute here concern calculation of loss, the offense leadership role, acceptance of responsibility, and whether there are grounds for departure. With respect –

THE COURT: Why don't I, let me get your recommendation first then I'll have counsel for the defendant to see what matters he's going to argue and then [3] you can respond to him.

What's the – It's 60 months incarceration, $125,000 fine.

MR. LOUCKS: Three years supervised release.

THE COURT: Three years supervised release.

MR. LOUCKS: And a special assessment.

THE COURT: Of 100.

MR. LOUCKS: Of 100.

* * *

[60] THE COURT: All right, I've heard arguments with respect to the offense level.

His criminal history category I guess is one.

MR. RUSSONIELLO: Yes.

THE COURT: This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

At this time I'll hear arguments with respect to a motion for downward departure. And I'd like argument at least on any factor that you wish to raise, but especially on two factors, the first Argument B in the Thurston's sentencing memorandum contained on Page 22, namely, downward [61] departure is justified because Mr. Thurston's record of charitable work and community service is unique, extensive and extraordinary, and Argument D on Page 34, namely, downward departure is justified in order to effectuate the sentencing guidelines policy of sentencing similar offenders to similar punishments.

And we have in view defendant Isola's sentence which was three years probation.

I'll hear counsel for the defendant on those two grounds and any others they wish to add.

* * *

MR. RUSSONIELLO: I've been a prosecutor for more years than I've been a defense lawyer, you [sic] Honor, and I think over the period of time I certainly have, it's been now 30 years, I think over that period of the time I've developed a pretty good sense of, well, outrage, certainly, at times, of balance because I've, in a sense, been on both sides of these things and have had a lot of experience [62] dealing with people who I prosecuted as well as people that I represented.

As the Court knows, Mr. Thurston was not my client until December of 2001 when Mr. Wall took sick and after Mr. Cullen's case was disposed of and we assumed that responsibility at his request.

We had heard up until that time, this is all pretty much reflected in the filing here, we had heard up until that time about Mr. Thurston's sort of commitment to his church and to his family and to his community as being somewhat extraordinary. Now most of that information was, of course, hearsay, it can came to us from Mr. Wall. And I guess that while we had some association with Mr. Thurston, it really wasn't until we got to the point of having to deal with his conviction that it was our obligation to kind of look into this with a microscope to find out, you know, whether this was really, is it possible that somebody can have this kind of an attitude, somebody can be this sort of committed to other people, be as selfless? I

think over time I've gotten pretty hardened to the con man and somewhat jaundiced at the notion that there are still people out there who, you know, are good, fundamentally good.

But this, finally, this discussion of ours which consumes almost seven pages is not a chalk. It's not, you know, lint or fluff. I mean it is reported accurate [63] evidence of his extraordinary behavior over time, long time. Before this arose, this case arose, during the time the case pended, after the conviction and since, somewhat now limited by his own church's decision that, for perhaps obvious reasons, perhaps not so obvious reasons, they didn't want him to be as out front as he'd been in the past. But the Sentencing Commission finally over time, I think has come to recognize that this callous, cold, matrical, factory like calculation of sentence would do an injustice in certain circumstances, would be unfair, fundamentally unfair, and that there were people who deserved special consideration. Not people who just said, you know, my family is going to miss me, not people who said, I've got somebody I need to take care of, you know, down the street, not somebody who says, my family is not going to be supported now because I'm going away, not somebody who says, you know, he's a pretty good Joe and you know, fellow well melt kind of person. But somebody who really deeply committed himself so much to others that the conduct, we would call it abhorrent conduct, the engagement in the activity is so outweighed by the person's selflessness that some serious consideration should be given to it. There is no one that I have ever met in my life who better typifies that, that case and that entitlement than Bill Thurston. It's difficult to go through, you know, each of the specific events which we [64] reported here, but

we reported them. We have reported them both here and the testimonial to that from people who, they weren't solicited, some obviously called and said they wanted to be heard, others who just heard about his difficulty who volunteered information, hundreds, I guess, of these letters that came, and certainly dozens of these letters that came in that I didn't even see that came to probation or to the Court or both. It's hard to overstate that his, his consideration by this Court would not be gratuitous but earned because of his extraordinary conduct.

As to the proportionality, if you want me to go on to the question of parity.

THE COURT: Let me hear the response with respect to – What's the position of the government with regard to a motion for downward departure on the basis of his record of extraordinary charitable work and community service? There is no doubt that he does fit in to an unusual category.

MR. LOUCKS: Your Honor, I think that there is no doubt that he has over the course of his career done extensive community and charitable work. But I note, your Honor, that he is in no different position than any other highly paid corporate executive who has similarly had the opportunity based upon his position in society –

THE COURT: I differ on that. Without talking about whether he's a highly paid corporate executive, I [65] think the evidence reflects here that he did something more than the usual corporate executive, in my judgment.

MR. LOUCKS: Your Honor, I'd like to draw the Court's attention to a series of cases involving Everett Crafts, United States versus Kohlbach, and I'm going to

read to the Court a quotation from that, one of the opinions, because there were three opinions in that case, two reversing downward departures based upon an extensive history of charitable good works. This is what the 6th Circuit said at the time of the second reversal:

> "We need not set a specific standard for how far above average an executive's community service must be to qualify for this departure, but can say with confidence that Craft's community service resume strikes us as not highly unusual for a person in his position. We acknowledge that the additional testimony established that Craft undertook community service efforts at a relatively young age and before he was an executive. We also acknowledge the fact that the testimony elevates him above the class of executives who donate only money or lend only their name. In the final analysis, however, we must be content to thank him for his generous [66] efforts but conclude that they are not sufficient to allow him to serve less time for the offense that he has committed."

Your Honor, we have addressed this issue head on in Pages 14 and 15 of our filing. I draw the Court's attention in that to the United States versus Kohlbach. It is usual and ordinary in the prosecution of similar white collar crimes involving high-ranking corporate executives to find the defendant was involved as a leader in community charities, civic organizations and church efforts.

I drew the Court's attention as well to the statement in United States versus Weinberger that downward departure should not be used for the advantage in society to have the luxury to donate time and resources, to be able to use that after they have been found guilty of crimes of dishonesty to buy their way out of the applicable jail sentence.

Your Honor, I certainly think that, you know, I can't stand here and I don't have prior sentencing proceedings involving prior individuals who are highly paid, highly, in stature and in organization, corporate organization, executives standing before a federal judge for sentencing. I don't have a comparison, if you will, of prior individuals whose Presentence Reports I have been involved with, whose sentencing I've been involved with [67] where they were being sentenced by the Court for a healthcare offense.

Mr. Thurston's community and charitable work is extensive, but I see it, it really is no different than other individuals that I've seen over the years. And I also think that rulings in those cases that I cited are appropriate here. I think Mr. Thurston is to be commended for what he has done in the past, but it does not and should not be used as a basis by the Court to depart downwards, to result in a substantial reduction of any sentence that should be imposed upon him.

Thank you.

THE COURT: I'll hear you on whatever response you wish to make and then on your, whatever else you wish to add.

MR. RUSSONIELLO: Cold, cold, cold and calculating is the only way to describe the government's view in this case. I mean this is the same government that gives Mark Rich a pardon for building homes in some foreign country. I mean this, we're talking here about a person whose involvement in criminal activity is, as I've said till I'm now virtually blue in the face, a novel theory of culpability whose conduct toward the community predates that by a generation and who, according to the

witnesses who testified in the case as co-workers, lived this sort of, I [68] don't want to sort of gild the lily on this, a Christian life, a Christ-like life every day. How many people do we know who do that? How many people in the U.S. Attorney's Office are there that do that? How many people on the bench are there that do that?

THE COURT: Well, I know one.

MR. RUSSONIELLO: One. Hopefully the spirit of mercy and justice will prevail.

THE COURT: Let the record reflect that that's said in levity. I'm not holding myself up as a paragon.

MR. RUSSONIELLO: And up until recently we assumed that certain, you know, individuals by virtue of their commitment to a vocation did and they didn't.

If not in this case for Bill Thurston, then no one, no one. And I submit that whatever may have been the interest of the Court in Kohlbach and whatever may have been persuading the Court in the Weinberger case and so on, and there may have been, you know, extenuating circumstances there that mitigated against a downward departure. In this case, if this, if this sentencing instruction and guidance is to have any validity whatsoever, any whatsoever, it's a kind of person like Bill Thurston who should get the benefit of it. This isn't just hyperbole, you know, this is fact.

Now, this parity of sentencing. Again, without boring the Court with my experiences, the whole purpose for [69] having the sentencing guidelines in the first place was because, quite frankly, the conclusion had been reached by whomever that giving the Court discretion to sentence was a mistake and that because of the divergence in sentence

in the same court, in the same district, between judges who were, you know, soft on drugs, judges who were hard on drugs, light for bank robbery, you know, heavy on bank robbery, tough on white collar crime, light on white collar crime, the sentencing guidelines were put into place in order to ensure that there would be parity, that people charged with the same events on the basis of the same evidence would receive the same sentence. That was the whole purpose. The only entity, the only component of our system that, quite frankly, the Sentencing Commission believed could be trusted with the responsibility to sort of be fair and respectful of this objective was the prosecution. Defense lawyers certainly couldn't, judges have demonstrated that they couldn't. And what we've seen over time, much to our chagrin, is that instead of that being the objective of the effort, charging has become a mechanism and a device for prosecutors to basically manipulate the sentencing guidelines any way they want, okay, that's fine, we asked for it, we got it.

But in a case such as this where the government doesn't squeak at the idea of the president of the company [70] charged with Apo transgression, charged with Ferritin transgression, charged with, you know, iron transgression, all of these tests, who has overall responsibility for not four labs but 16 labs at a time after the, after the company has already, you know, spent $119 million in fines and penalties, paid criminal sanctions and so on. And the defendant gets 125 days – excuse me, $125 special assessment and three years probation, and the government doesn't squeak. So the government can now come in and say, oh, yeah, by the way, this is a different case. Mr. Thurston is really the linchpin of this mob and this conspiracy, and to give him 60 months would be generous

because the sentencing guidelines say he really should be getting 78 to 80, or whatever the number is.

In order for want objectives of the sentencing guidelines to be respected in spirit as well as in the letter of them, in order for the government to sort of be once again reminded of its oath and its responsibility, sentencing Mr. Thurston to no more than Mr. Isola was sentenced to, despite the fact there has been a trial, is not only fair and reasonable, it's compelled, in my view, my view, but it's compelled.

I don't know how many more sentencing cases this Court will be involved in, but this has been an extraordinary experience for all of us, I think, and we have [71] spent a long, long, long time together on this, but I think that he we have come out at the back end where we went in on the front end in terms of recognizing this was a novel approach of creative prosecution targeted against some individuals who were decent people, who fundamentally, if anything, got themselves caught up in abhorrent behavior and who'd benefit not at all from incarceration and provide no deterrent whatsoever to anyone similarly situated, given that the government has found a way to sort of rectify the problem it may have created in the first place by its collective indifference over 20 years before, before this, before this episode even began.

So I submit that there is more than sufficient basis for the Court to exercise its discretion here and to impose a sentence consistent with the sentence imposed on Mr. Isola.

THE COURT: Well, at this time I'm only going to grant the motion for a downward departure, and I'll hear further argument as to what the appropriate sentence

should be. But in granting the motion for downward departure, I'm basing it on two grounds.

First, the downward departure is justified because of the defendant Thurston's record of charitable work and community service is unique, extensive and extraordinary. I think the record should reflect that in over 14 years of [72] sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church.

And the second ground is that which is set out in the United States Sentencing Commission Guidelines Manual under Chapter 1, Part A, Section 3, which is entitled "The Basic Approach, paren, policy statement," unquote or, "The Basic Approach, paren, policy statement," closed paren, setting forth the rationale of the guidelines, it's cited here that Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

We have a situation here where coconspirator Isola, the president of Damon and the architect, at least the prime architect of this conspiracy, received a sentence of three years probation, and it is, in my judgment, a violation of the fundamental purpose of the Sentencing Commission Guidelines to impose a sentence which is not at least somewhat similar to that incurred by a coconspirator who was more involved in the conspiracy tan [sic] this defendant.

So at this point I am granting the motion for [73] downward departure based on those two specific grounds.

At this point I would – I think for the sake of all parties, why don't we take a three-quarters of an hour and I'd like to hear arguments on what would be an appropriate sentence in view of the defendant's extraordinary character and service, devotion to his church, and especially how to make any sentence imposed comparable to that which was imposed upon the president of Damon, Mr. Isola.

So let's return at quarter of two.

(Recess.)

THE COURT: I'll hear from counsel for the defendant.

MR. RUSSONIELLO: Your Honor, our –

THE COURT: First of all, I'd like whatever argument you make, whatever way, but using the president, Mr. Isola, as a guideline.

MR. RUSSONIELLO: Yes. And the Court recalls that Mr. Isola was sentenced to a period of three years probation and a special assessment of $100. And taking into account the fact that Mr. Isola was president of the company, that he had responsibility for all operations of Damon for the entire period of the alleged conspiracy, that Mr. Thurston was one of his subordinates who only for a period, a short period of the time of the five years, actually had [74] supervisory responsibility for the laboratories but moved to Boston and assumed administrative responsibilities totally unrelated to any of the billing practices, and was certainly, Mr. Thurston that is, would be far less

culpable in the grand scheme of things than the president of the company.

In order to achieve parity and proportion of sentence and proportionality, as the Court has indicated are the keystones of the notes to the sentencing guidelines, we believe that under no circumstance should Mr. Thurston be sentenced to anything more than the statutory penalty of $100 and a period of probation, if appropriate, not to exceed three years. So a downward departure to 8 or less in order to accomplish that is our recommendation.

THE COURT: In looking over the guidelines, it would appear that the sentence that was imposed was based on, I would think, an offense level of 8, because anything over that would have required a period of, I think, incarceration.

MR. RUSSONIELLO: Some community service. Anything 9 or 10 would have required some.

THE COURT: The way, in retrospect, that had to be calculated, it had to be calculated by the basic offense level of 6 and an aggravated participation of four minus two for acceptance of responsibility.

[75] At least with respect, even with respect to the issue of parity or no disparity between similarly affected or involved defendants, I've already ruled that this defendant does not receive the two points for acceptance of responsibility, and therefore, at least in my initial judgment, that there is a basis for some difference between Mr. Thurston and Mr. Isola in view of the fact that one in pleading to this case received a two point deduction. How – how do you say that should not be considered?

MR. RUSSONIELLO: Well, I have no real response to that. If the Court is going to consider that the, that it feels bound by the determination of the calculation of offense level for purposes –

THE COURT: I'm not bound by it but it is a guideline in the way I'm calculating it, I have to have some basis for calculation.

MR. RUSSONIELLO: We would submit that the parity and proportionality is only one of the two combined grounds that the Court is taking into account in deciding the downward departure, that the other ground, charitable works, extraordinary charitable works was something which was not in play at all with respect Mr. Isola, and therefore the Court has the discretion to consider in departing downward to include in the relief, as it were, that it's given to Mr. Thurston the extraordinary special circumstance of his [76] charitable works so that to reach a level of 8 takes into account that, under the normal circumstances, parity by itself, 10 might be the appropriate level, but including his charitable works as factor in the downward departure calculation, 8 is still proportional and is relatively equal, it doesn't have to be exact but relatively equal to what Mr. Isola received.

THE COURT: The other factor out there is that although I granted a motion for downward departure in accordance with my original calculations of an offense level of 26, to reduce someone's sentence from 63 months, or in this instance from 60 months, to probation is extraordinary.

MR. RUSSONIELLO: It is. And if it were not for Mr. Isola's sentence, the Court would not have any frame of reference, because no doubt when Mr. Isola was sentenced,

the intended loss, the actual loss was what had been determined to be approximately $16 million. The intended loss, the calculated loss was of no consequence whatsoever to the government at that time in arguing Mr. Isola's, or in arguing against Mr. Isola's sentence.

And presumably the government was as committed to its assessment that the loss was 16 million then as it was now. And the reason I say that is, the indictment in this case originally did say, did plead as an element that the loss suffered was $16 million. The Court may recall that in [77] conforming the sanitized indictment to prove, the government dropped, voluntarily dropped any reference to the dollar amount because it hadn't proved any, and so that issue went to the jury for its consideration. Defense obviously argued that referring to the $16 million was highly inflammatory. But the fact of the matter is, the government has contended right from the get go in the indictment that $16 million was the calculated loss, therefore if it had or was to have any merit for purposes of Mr. Isola's sentence, it was dismissed as unimportant, and for purposes of Mr. Thurston's sentence proportional to Mr. Isola's and in relative parity to Mr. Isola's, it should be given the same valu[illegible], i value [sic], it's not.

THE COURT: I'll hear from the government.

MR. LOUCKS: Your Honor, for the record, the United States opposes any downward departure on the basis of any alleged disparity in sentencing. We don't know what the sentence is yet for Mr. Thurston, but any disparity in treatment.

There are – the Courts frown on departures downwards based upon that, and there are an incredible number of reasons here that distinguish Mr. Thurston from Mr. Isola.

Firstly and foremost, Mr. Isola never pled to anything with respect to the Ferritin addition to the lab [78] scan. Mr. Isola's –

THE COURT: That was because subsequent to the indictment that there was an information that charged those offenses not relating to Ferritin.

MR. LOUCKS: Right, the Apolipoprotein additions.

THE COURT: Right. So that was, I think that was, my impression was that was done as a means of a plea bargain.

MR. LOUCKS: But the crime condition for Mr. Isola is a crime relating to the addition of the Apolipoproteins, not the Ferritins, and that conduct took place in 1989.

THE COURT: But that was because of a plea bargain understanding. The fact, though, is that one was the president and the other is the vice-president, that's the fact, and they both were there over the entire time, so address that, I mean that's the real point.

MR. LOUCKS: You indicated before our break that you thought Mr. Isola was the prime architect.

THE COURT: In this way he was the president, he had to be the man in charge.

MR. LOUCKS: Simply being the president isn't sufficient proof that a person is involved in criminal activity.

THE COURT: Well, he obviously was involved in criminal activity because he was charged and he pled.

[79] MR. LOUCKS: He was charged and he pled and admitted willful blindness as to the Apolipoprotein addition to the coronary risk profile. He did not admit and plead to any conduct related to the Ferritin tests.

THE COURT: Let met ask you this, am I wrong, wasn't that the same proposition provided this defendant that he had pled? I mean am I wrong there? Namely, is it true or isn't it that this individual –

MR. LOUCKS: Well, your Honor –

THE COURT: Let me ask the question. Was the same proposition afforded this defendant, namely, if he pled guilty or pled nolo contendere he would have got a probationary sentence?

MR. LOUCKS: Your Honor, we never made any representation that the Court would give a probationary sentence on a nolo contendere plea. We always opposed a nolo contendere plea. We don't have any control over what the Court imposes as a sentence. The only power we have is to choose to appeal or not appeal. We did say to this defendant that we wouldn't appeal a sentence imposed if he pled guilty.

THE COURT: Are you telling me that that sentence in that case was a shock to the government, is that what you're telling me now?

MR. LOUCKS: No, I'm not saying that sentence was [80] a shock to the government.

THE COURT: My question is, was he offered the same deal as Isola was?

MR. LOUCKS: Your Honor, we discussed with his counsel a plea along the lines to an information similar what Isola pled to.

THE COURT: If that's so, it was the, and it is so, they both were involved to the same extent only Isola was the president.

MR. LOUCKS: But, your Honor, from the very beginning of this case I have consistently said to all counsel involved that the evidence of proof, or the evidence of Mr. Thurston's involvement in activity is far, far more substantial than the evidence of any other defendant.

Your Honor, I want to say this with respect to Mr. Thurston's testimony and Mr. Isola's testimony. You indicated before the break that Mr. Isola was the prime architect of the criminal activity. Mr. Isola denied that when he testified, he said on that stand. Mr. Thurston –

THE COURT: What's nolo contendere?

MR. LOUCKS: That's willful blindness.

THE COURT: Whatever. He pled guilty.

MR. LOUCKS: Well, another big distinction between the two, your Honor, is this, is that there was no instruction to this jury at the time of the trial on the [81] willful blindness. This case was not tried on a theory of willful blindness.

THE COURT: Let me ask you this: Is there any difference between Isola and this defendant, in your view?

MR. LOUCKS: Yes.

THE COURT: Is there involvement in this criminal conspiracy?

MR. LOUCKS: Yes.

THE COURT: Then why was the same deal offered to both of them? Why was the same deal made to both of them? I'm not here to argue the Isola case up, I merely said it's being used as a guideline, but if you're going to go in and tell me that Isola is substantially different than this defendant, then I don't believe you.

MR. LOUCKS: Well, your Honor, can I respond? First of all, I think this defendant lied at his trial, that is a substantial difference. At the time of Mr. Isola's sentencing, he had not testified under oath, anywhere denied any role in any criminal activity. When Mr. Isola testified here, he denied any corporate plan to add Ferritin, as did this defendant. For the Court to conclude that Mr. Isola was the architect of this defendant's crime, which is the addition of Ferritin to the lab scan, not Apolipoprotein to the coronary risk profile but the addition of Ferritin to the lab scan. The Court has to conclude that Mr. Isola lied [82] and that Mr. Thurston was a liar.

THE COURT: Let me ask you this, are you telling me that Isola didn't know what he was doing with respect to the Ferritin addition? Is that what you're telling me?

MR. LOUCKS: The evidence that came in this case –

THE COURT: I'm asking you, are you saying that he didn't, notwithstanding the fact that he pled only to one aspect of this scheme, is it your position that Isola

had no understanding of or no involvement in adding Ferritin to the voucher?

MR. LOUCKS: Your Honor, can I answer it this way?

THE COURT: No, I'd like you to answer the question, whatever way you wish.

MR. LOUCKS: Well, I'm not ducking the Court's question, okay, but I want to say this, that whatever my own personal opinion is not material, what is material is what was the evidence presented at the trial. The evidence presented at the trial in this case was that Mr. Thurston directed the addition of the Ferritin. Mr. Isola sat on the stand and denied any corporate role as did Mr. Thurston. Do I personally think Mr. Isola was involved in the decision making in this company? Yes, but that's not what was proven.

THE COURT: It seemed to me that it was proven. [83] He was there at most of the important meetings.

MR. LOUCKS: Well, then, if it was proven that he was involved in the Ferritin addition to the lab scans, then both he and Mr. Thurston lied about it in their testimony, and that is the basis for treating Mr. Thurston differently than Mr. Isola. Mr. Isola's lies, if he lied during the trial in this case, and I'm not saying he did, okay, Mr. Isola lies came well after any sentencing by him, at this point the United States would have to make a charging decision on whether Mr. Isola should be prosecuted for any perjury he committed in Mr. Thurston's trial.

Mr. Thurston's lies came to the jury which the jury rejected. Now if you look at the sentencing guidelines for

perjury, the sentencing guidelines for perjury are 12 or 6 less, and then you go to the accessory, 12 or go to accessory after the fact. Accessory after the fact says 6 less than the underlying offense. The underlying offense here is 26 points, so the perjury guideline for Mr. Thurston is 20 points.

THE COURT: So what is your recommendation?

MR. LOUCKS: Well, my recommendation, your Honor –

THE COURT: And in view of my original question, would Isola be a president of Damon and his receiving, with no opposition from the United States, a term of three years [84] probation, what do you believe is the fair sentence to be imposed on this defendant who was the vice-president?

MR. LOUCKS: Well, your Honor, I went and looked at departure downwards and levels of departure downwards because I think those are our guide, and I look at level of departure downwards in cases involving charitable works, good works, and I couldn't find over the last several days and today any departure greater than three levels downward.

THE COURT: How about on disparity?

MR. LOUCKS: On disparity, your Honor, I will read to you what I found in a case from February 6, 2001, the 11th Circuit. I'm reading at Pages 1325 and 1326, and it's 240 F. 3d 1321. And I'll read the whole paragraph.

> "Finally, Ruggiero argues that the district court's disparate treatment of her and her codefendant, Perez, violates the sentencing guidelines. specifically,

she claims that the district court's failure to consider a 5K2.7 departure for Perez indicates that the court's decision to impose upward departure was based on emotion, not on the facts of her case. Ruggiero also claims that this disparate treatment violates the principle of uniformity of sentencing that animates the guidelines."

[85] And the 11th Circuit concludes as follows:

"We disagree. Disparity between the sentences imposed on a codefendant is generally not an appropriate basis for relief on appeal."

And it cites a prior 11th Circuit case.

"As we explained in Chodhus, quote, 'to adjust the sentence of one codefendant in order to cure an apparently unjustified disparity between defendants in an individual case will simply create another wholly-unwarranted disparity between the defendant receiving the adjustment and all similar offenders in other cases', closed quote."

And, your Honor, this was a $5 million intended loss the Medicare program. That case also looked at nether, and found in a case involving a loss to the Medire program of $15 million, that was a basis for a depare upward because it's interference with –

THE COURT: Let's get right down to the nubes. It's my understanding that the sentence imposed ainst Isola was not opposed by the United States.

Two, the same deal was offered to this defendant. This fendant went to trial. We're in a position that the [86] vernment is asking, the first point, for 78 months for is defendant who went to trial and three years, in sence, probation for one who pled. That's a disparity. I'm

king you, in your judgment, what recommendation you n give me, what do you think I should do, that's the ue.

MR. LOUCKS: And, your Honor, I think that Court should, at a bare minimum, sentence Mr. urston to the applicable perjury guidelines for his lies ring his testimony at the trial of this case, something t Mr. Isola did not and had not done at the time of his tencing.

THE COURT: Are you saying that Isola testified sely in this case?

MR. LOUCKS: No. Mr. Isola's testimony hap-ned well after his sentencing.

THE COURT: But are you saying he testified sely in Thurston's case?

MR. LOUCKS: I think Mr. Isola, I think, based what the Court concluded, that that conclusion can be wn, that Mr. Isola, when he denied any corporate plan, s not testifying truthfully. Mr. Thurston denied any porate plan. All of the managers who reported to him d that it was Mr. Thurston –

THE COURT: You're asking me now to sen-ce –

[87] MR. LOUCKS: I'm not.

THE COURT: – two defendants who haven't n charged on the basis of perjury?

MR. LOUCKS: No. I am asking and stating, and said in our moving papers that this Court should apply enhancement to Mr. Thurston's sentence for his lies

uring his testimony at trial. We have always asked for iat.

THE COURT: What's your recommendation ere? I've already ruled that the so-called bench level is 6.

MR. LOUCKS: Right. And I recommend this. Vell, we oppose any departure. We oppose any reduction r any departure. But I think that the Court should not epart any further down than the perjury guidelines that ould apply as to Mr. Thurston's perjury in the trial in iis case.

THE COURT: And what is that?

MR. LOUCKS: Well, that's a 20, and the range 33 to 41.

THE COURT: All right, I'll hear counsel.

MR. RUSSONIELLO: Thank you, your Honor.

In the first place, I think the Court in it's calculation f Offense Level 26 has rejected the notion that there was erjury on the part of the defendant Thurston here, I iink the Probation Department correctly said that rather ian take the government's view of what it thinks were ie three things that were testified to by Mr. Thurston [88] iat were false, that it was up to the Court to make that idgment, because the Court had the opportunity to bserve his demeanor, the Court heard his testimony, and ie Court is in a better position than probation to be able o make that judgment. The Court has made that finding, iat there was no, in effect there was no obstruction of istice, there was no testifying falsely. Witnesses often erceive things differently.

The fact, as I've explained earlier, the fact that Mr. Thurston has insisted that he did not intend to deceive or trick the doctors, that he did not intend to conceal in any way the manner in which the Ferritin was being added to lab scan, that he did not direct that the advertising be done in such a way as to conceal that there was a choice to add Ferritin. All of these things are in our brief substantiated as true. It is not the case that the jury necessarily had to, had to find he had lied in order to find him guilty because the government's theory of the case was that Mr. Thurston joined the conspiracy when he signed off on the CERs.

Mr. Isola signed off on the CERs. Mr. Isola attended the same P2 meeting that Mr. Thurston attended where the same discussion took place about this so-called revenue enhancements in order to offset Medicare losses.

The idea that the Court should take into account [89] Mr. Thurston's perjury now, he's not been charged with it, he's not been convicted of it, but that the Court should find that he lied, and then in finding that he lied, impose a substantial sort of penalty for something which is neither proved, charged nor proved, seems to me is inappropriate.

The Isola involvement in this was at first that he managed both, oversaw both components of the single-count conspiracy, manipulated the Apo, manipulated the Ferritin.

The government chose to file an information. The government made a judgment, on the basis of no hearing, no evidence, that it would file a single allegation in an information alleging only the Apo and not the Ferritin. Now, did it do that because it considered the Ferritin case to be weaker? No. The government now says the Ferritin

case was stronger, the government says the case against Mr. Thurston was a stronger case.

We're not talking about the probity of the evidence, we're talking about the relevant culpability of participants in the crime. That is what disparity in sentencing, that is what the, that is what the guideline is designed to address, it's not whether or not one is more likely to be convicted than another, it is the question of in the scheme of things, which is the person of several who had the greater involvement, both in terms of certainly benefit to be derived? Mr. Isola. Overall management [90] responsibility? Mr. Isola. Ability to direct a greater number of persons? Certainly Mr. Isola. Force of personality? Mr. Isola, very persuasive sort of person. And vis-a-vis, Mr. Thurston, clearly a person of greater culpability for the $16 million the government from the outset claimed was the, was the sum derived from the Ferritin effort.

Now, it chose to abandon that for whatever reason. It now, as I suggested earlier this morning, the only reason that they can come up with for suggesting that Mr. Thurston should not be punished for having a jury trial is that he lied and that there was some concealment. Those are the only two grounds for suggesting that he should be treated differently.

We have taken a great amount of the Court's time today and we spent a lot of time in the brief addressing the so-called false statement issue, and I just say finally that it is not necessarily the case that the jury had to disbelieve him, find him to be lying in order to find him to be guilty under the conspiracy as it was charged.

And so, you know, I submit that given that in terms of relative culpability, Mr. Isola has always been considered

to be more responsible. He was the person who was first named in the indictment. He was the person who was considered to be the, in a sense, the manager of this [91] company for all of this time period. And the fact that the government, for whatever reason, made a proposal to him and then chose to stand by quietly while a perfunctory sentence was imposed suggests that Mr. Thurston's sentence in the case should be no greater.

THE COURT: Any quick?

MR. LOUCKS: Yeah, just quickly, your Honor.

The Court heard testimony from Mr. Bryant, the office manager in Newbury Park. Mr. Bryant admitted engaging in acts that were trickery. The government determined in the course of the investigation to extend to him immunity as a judgment by the executive branch. That that individual who was culpable in this activity was not prosecuted does not mean and is, I think, not relevant to any sentence to be imposed on Mr. Thurston. The government often takes action in cases to plea bargain with defendants where it is a question of proof that the government can in fact meet its proof in a case. We did meet our proof in this case as to this defendant. This defendant did testify that he was not involved with criminal activity and the jury rejected that. I don't think it's relevant at all what discussions we may have had with this defendant about any potential plea prior to trial, and I don't think it's pertinent for the Court to make a 18-level departure downward, as the defendant suggests, and impose a sentence [92] of probation on this individual, from an offense level of 26 down to 18 just should not happen.

MR. RUSSONIELLO: This is a bed that the government made, this is a bed that the government made

when it entered into the plea with Isola. It basically said to us, it said, this is the frame of reference for this case, and now it suggests that it's not a frame of reference, that it's irrelevant. I submit that the only reason that it's irrelevant is because the government is unhappy with the way that that particular venture is now being thrown back in its face.

Every bit of evidence that was admissible in this case – And Isola, by the way, was a named coconspirator when we went to trial, it was not one of these things that Isola was sort of found to be uninvolved in Ferritin. When we started the trial in this case, we asked for the names of those persons, both named in the indictment and otherwise, and Isola was one of the named defendants who stayed a named coconspirator in the case. And so there was always the suggestion by the government that Isola's involvement in the Ferritin aspect of the case was at least as great if not greater than Mr. Thurston's. So they should not be permitted to duck what they chose to do with respect to him in trying to justify what is an extreme sentence for Mr. Thurston.

[93] THE COURT: I'll hear from Mr. Thurston.

MR. RUSSONIELLO: Right here?

THE COURT: Sure.

THE DEFENDANT: Thank you, your Honor. I think there are several things that I would briefly like to talk about.

First of all, I think it's important for me to recognize and in fact apologize for the amount of time and effort that has been expended on this trial. We talked about the offer that was extended to me to plead nolo such as Mr. Isola

did, and I rejected that offer. I rejected that offer because I believed that the truth would be known at trial and that as a result of that I would not be convicted. That didn't turn out that way, I understand that now, and to a certain extent I feel badly that I expended that time and effort and did not accept what was offered to me prior to trial.

I would like also to speak briefly, since we have talked about it a lot today, about the issue of false testimony at trial. Excuse me. I have had throughout my adult life a principle of honesty. I believe that that has been borne out by the letters which have been written.

THE COURT: There's no doubt you've had, as I've indicated, an exemplary life.

THE DEFENDANT: For me, having had and still have [94] that principle of honesty, which I learned from my parents, for me to violate that honesty by saying something that isn't true in order to get off the hook, so to speak, it's not in me. Those who know me well, some of them are here, my family members and friends and associates at Damon, if I were to say something like that, it would violate the very thing for which they have held me in high esteem. I couldn't do that.

So what is the truth? The truth is that there wasn't really a conspiracy, there was a business decision to add a test to a panel of tests for several reasons, one of which was to get additional revenue, I testified to that at trial. One of which was to offset Medicare reductions, I testified to that at trial. And one of them was to meet competition because all of the other laboratories had already added tests to their panels, and without that, we would have been at such a serious competitive disadvantage that we might have been out of business. We weren't leading that

effort, we were following it. There was plenty of evidence at trial that shows that we were a follower, not a leader.

Did we do it in a way that was intended to trick the doctors? No. We certainly did it in a way which was competitive, in a competitive business environment, but I had no feeling inside me that said what I am doing is [95] against the law. It turns out that when, when the government began to look at this, they began to view it that way. And so if I, if I play Monday morning quarterback, I can look back and say, Yeah, maybe that, I shouldn't have done that that way, I wish I had known that at that time. But I do accept responsibility for the things which I did and I have never denied the responsibility for the things which I did. And I place that, I think, on record and it's in the court documents.

Now, you know, the trial didn't end the way I thought it would. That does not – that does not change my belief in the American system, I'm still proud to be an American and I will continue to be proud of the American system and the American system of justice.

Now, I would like to take a minute and offer some expression of appreciation first to those who have represented me here, Mr. Wall, for many years, I appreciate it. And Mr. Russoniello and Mr. Wall, or Matt Brown who stepped in, really, at the last minute because of the illness on the part of Mr. Wall, had picked up the flag and I think waived [sic] it proudly and rightfully, so thank you to them.

I want to publicly thank those also who wrote letters on my behalf. Most of them were not solicited, a few were, maybe five or six, the rest came at their own [96] desire.

And finally I owe a deep expression of appreciation to my family, several of them, also my siblings, all but one are here today at their own expense to provide support. Two of my four sons are also here. And I would be remiss if I did not express my eternal appreciation for the most loving spouse who has stood by my side and knows me better than anyone and who has been my chief supporter.

Now, my attitude going forward, whatever the sentence may be. I admit and I know Mr. Wall remembers that at the beginning I had somewhat of a why me attitude. I have learned over time that that why me attitude was really a feeling of resentment and that isn't what I want. And so what I have tried to do is change my attitude from why me to what is required of me, and whatever that will be, that will be my commitment to fulfill whatever is required.

Perhaps the feeling of resentment is best replaced with an opportunity for growth and perhaps service. Perhaps I can paraphrase that by saying that I'm willing to accept the bitter cup without becoming bitter myself, that's my goal.

I thank the Court for your attention and all of the others who I've failed to mention who I'm sure have spent much time and effort finding the right thing, and I [97] submit myself to the Court.

Thank you.

THE COURT: I'm going to impose the following sentence. So the record is clear, that I'm using the sentence imposed against Mr. Isola as the guideline, and taking into consideration the defendant's extraordinary contributions and service to society, and especially to his

religious obligation, I'm going to impose the following sentence:

A term of imprisonment of three months with the judicial recommendation that said sentence be served in a halfway house. Supervised release for 24 months with the special condition that the first three months of supervised release be served in home detention. No fine. $100 special assessment. A special condition of supervised release in addition to that already specified is that defendant is prohibited from possessing a firearm or other dangerous weapon. The defendant is allowed to voluntarily surrender at the institution designated by the Bureau of Prisons, said designation to be made on or before July 29, 2002.

* * *

[99] THE COURT: That's satisfactory.

So let me then reiterate what the sentence is in view of the amendment.

A three-month term of imprisonment with the judicial recommendation that it be served at a halfway house. Supervised release for a term of 24 months, a special condition of said supervised release being that the first three months be served in home detention. $100 special assessment. And a further special condition of supervised release, that the defendant is prohibited from possessing a firearm or other dangerous weapon. The defendant is afforded the right to voluntarily surrender on or before September 1st, 2002, and such voluntary surrender should be done either at the institution designated by the [100] Bureau of Prisons or the United States marshal's office.

MR. RUSSONIELLO: For the District of Utah.

THE COURT: For the District of Utah.

MR. RUSSONIELLO: Thank you.

THE COURT: Anything further?

MR. RUSSONIELLO: Nothing further your Honor.

THE COURT: Again, you have the right to appeal the sentence.

(Whereupon, the above-entitled matter was adjourned.)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * * * * *

UNITED STATES of AMERICA,	*	
Plaintiff	*	Criminal No. 98-10026
	*	**Plea and Disposition**
v.	*	
JOSEPH ISOLA,	*	
Defendant	*	

* * * * * * * * * * * * * * * * * *

Before the Honorable Edward F. Harrington
United States District Court Judge

APPEARANCES:

UNITED STATES ATTORNEY by Susan Winkler, Assistant United States Attorney, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02210, for the Government.

WILLKIE FARR & GALLAGHER, by Benito Romano, Esq. 787 Seventh Avenue, New York, NY 10019-6099, for the Defendant Isola.

John Wall, Esquire, Six Beacon Street, Suite 220, Boston, MA 02108, for co-defendant William Thurston.

COOLEY GODWARD, LLP, by Joseph P. Russoniello, Esq., One Maritime Plaza, San Francisco, CA 94111-3580, for co-defendant Gerald Cullen.

DWYER & COLLORA, by Thomas E. Dwyer, Esquire, 600 Atlantic Avenue, Boston, MA 02110, for co-defendant Beno Kon.

Courtroom 19 – One Courthouse Way
Boston, Massachusetts 02210
July 28, 2000 – 9:05 to 9:41 A.M.

* * *

[2] (Defendant is present in the courtroom.)

THE CLERK: Criminal No. 98-10026, United States versus Joseph Isola.

THE COURT: I'll hear from the government.

MS. WINKLER: Your Honor, we are here today on a change of plea hearing and we have an information and a statement of facts to offer to the court.

THE COURT: All right. Let me see the information.

(Documents were handed to the clerk.)

THE COURT: Is there a plea agreement in this case?

MS. WINKLER: There is not, your Honor. Well, there is an agreement but it is not reduced to writing.

THE COURT: This is an information. What is the status of the indictment? Is that to be dismissed?

MS. WINKLER: Assuming this is accepted today, your Honor, we will be moving to dismiss the indictment as to this defendant.

* * *

[3] THE COURT: All right. The defendant is allowed to proceed by way of information. What do you wish to say?

MR. ROMANO: Yes, your Honor, by way of background, your Honor, we were last before you in April in which we discussed the terms of a plea agreement that have not been reduced to writing, but form the subject of lengthy negotiations between myself on behalf of Mr. Isola and the government, and just to bring the court up-to-date on what the terms are, so that we are proceeding with full knowledge of what we are dealing with here, the government has already indicated it agrees to dismiss the underlying indictment once this matter is disposed of; and the filing of this new information is the instrument to which Mr. Isola intends to enter a plea. Mr. Isola intends to enter a plea of nolo contendere to this information to which the government will lodge an objection on the grounds of office policy.

The government has also agreed not to appeal any sentence that the court would impose and has also agreed that, [4] and we have both agreed, a presentence report is not necessary in this case and we have waived it in the interest – in the public interest.

When we were last before your Honor, we outlined the terms of this plea and your Honor indicated that in light of the unusual circumstances and background of this case, because it has been pending for so long and the conduct that is outlined in the information goes back to 1987, that your Honor thought, indicated in our last conference, that a sentence of probation would be appropriate and there was no indication in our lobby – at our last conference that a fine would be imposed.

This – Mr. Isola was previously employed by a company that has also pleaded and has paid nearly 120 million dollars, so the government has been compensated

for whatever losses it may have suffered, if any, many, many times over.

On the basis of that conference that we had before your Honor, we are here today for the purpose of carrying out the terms of the plea agreement.

THE COURT: All right.

THE CLERK: Is there a waiver?

THE COURT: The defendant has recited plea negotiations, most of which I am fully aware of and I wish the government to make any response that it wished to with respect to the defendant's representations.

[5] MS. WINKLER: Your Honor, Mr. Romano has correctly outlined the negotiations and the agreements between the parties.

* * *

[6] THE COURT: Let me see the information.

[7] (Clerk handed document to the court.)

THE COURT: I was reviewing the information to determine whether there is just one charge or more than one and it indicates there is only one count.

MR. ROMANO: There is only one count, your Honor.

THE COURT: What is the maximum penalty provided by statute for the offense to which the defendant is offering his plea?

MS. WINKLER: Five years and $250,000 fine, your Honor.

* * *

THE COURT: All right. Take the plea.

THE CLERK: Joseph Isola, the United States Attorney for the District of the Massachusetts charged one count of criminal information charging you with conspiracy to defraud the United States. That is a violation of title 18, United States Code Section 371. What say you to this information as charged, guilty or not guilty?

[8] THE DEFENDANT: Nolo contendere.

THE CLERK: You may be seated.

THE COURT: I will hear from the government and to set forth briefly the evidence which it would have introduced were the case to have gone to trial.

And very briefly.

MS. WINKLER: Your Honor, briefly, the Government would expect to show that Joseph Isola was employed by Damon Clinical Laboratories and as of 1989 he held the position of president, that in that same year the Medicare program announced it was going to reduce fees it paid to clinical laboratories for certain tests and that the defendant was aware of that, that the defendant knew the Medicare program did not pay for clinical laboratory services that were not reasonable and necessary for the diagnosis or treatment of Medicare beneficiaries, that in that summer of 1989, the defendant Joseph Isola and others decided that Damon would add and begin to add an apolipoprotein A and B test to its standard coronary risk panel and that they would do so by charging the Medicare program at least $15 for each test while the physicians would receive it for no less than $5.

The requisition form used by many physicians to order those panels was not changed to allow the physicians a choice; that is, that the panel included apolipoproteins regardless and that the addition of those apolipoproteins to the panel was not [9] announced on the front of the form so physicians may not have known that that was an addition.

That many physicians ordered these panels unaware that Damon was going to charge the Medicare program a higher price than the $5 price the physicians were charged for the same test and that the physicians were unaware that they could receive these panels without the added test. The defendant Joseph Isola subsequently attended budget meetings and received financial reports and knew that Damon after it had added the apolipoproteins to the preliminary risk panels that many of the physician customers began ordering those tests; and as a result, the government would expect to show that the defendant knew that Damon subsequently billed Medicare and the CHAMPUS programs for these apolipoprotein tests and did so willfully blind to the fact that many physicians did not exercise independent medical judgment as to the necessity of these added tests, and that he was further willfully blind to the fact that a significant percentage of those tests were not medically necessary for the Medicare programs for whom they were ordered, and that as a result from 1989 through November of 1992 the defendant Joseph Isola together with others did knowingly and intentionally combine, conspire and agree to defraud the Unite States and its agency, the Health Care Finance Administration in administering the Medicare program by engaging in deceit, craft and trickery, in dealing with physicians, other customers [10] and others in bundling

together a test to cause physicians to order blood tests that were not necessary for the treatment or diagnosis of patients so Damon could bill the Medicare program for unnecessary tests and obtain money from the Medicare program to which it would otherwise not be entitled to have obtained.

Your Honor, if I may also briefly add, the government does object on policy ground to the entry of a nolo plea, but also believes that the statement of facts that was signed by the defendant and has been submitted in support of this information today maintains a legally sufficient basis for the entry of a judgment of violation of conspiracy to defraud the government under 18 USC Section 371 based on willful blindness.

THE COURT: The government has made a statement of facts as to the evidence which it would have introduced were the case to have gone to trial. Do you contest any of those representations or is there anything that you wish to add?

MR. ROMANO: May I speak, your Honor?

THE COURT: Surely.

MR. ROMANO: We don't dispute the factual portions of what the government just presented. The entry of a plea of nolo contendere is intended to acknowledge that while Mr. Isola's position is the practices were legal at the time, it is acknowledgment that while those practices occurred back in 1987, some of those tests may have been unnecessary, some of [11] the tests that were ordered; and we agree that the facts that were presented can provide a legally sufficient basis for the entry of a judgment.

THE COURT: All right. The statement of facts document may also be entered in this case.

* * *

THE COURT: I will accept the nolo contendere plea and [12] enter a finding of guilty thereon.

I find that the plea has been voluntarily and knowledgably offered with an understanding of its possible consequences.

I further find that there is an independent basis in fact for accepting the plea and therefore accept the plea of guilty and order that – strike that. And therefore accept the plea of nolo contendere and order that it be entered in this case.

What's the government's recommendation with regard to sentence?

MS. WINKLER: Your Honor, the government has no recommendation with regard to sentence.

THE COURT: It is my understanding from the recitation of the facts and my memory of various prior proceedings in this matter, that Damon, the corporation for which the defendant worked, has already been adjudged guilty in this matter. Is that correct?

MS. WINKLER: That is correct, your Honor.

THE COURT: And what was the penalty imposed in that case?

MS. WINKLER: As a criminal fine, they paid approximately 35 million dollars or – it was between 33 and 35 million dollars. But it encompassed more conduct than is encompassed by this particular information.

[13] THE COURT: So I heard I think today or my memory is that there was a figure of 120 million.

MS. WINKLER: Yes.

THE COURT: What does that represent?

MS. WINKLER: There was an additional civil settlement in addition to the criminal fine that covered the conduct that was encompassed in the corporate information as well as additional conduct.

THE COURT: And what was that amount of money?

MS. WINKLER: It was around 85 million. It was a total of 119 million dollars between the civil and the criminal resolutions.

THE COURT: So the government is not making any recommendation?

MS. WINKLER: The government is not making a recommendation on sentence.

THE COURT: All right. I will hear from the defendant's counsel.

MR. ROMANO: Your Honor, as we previously described, Mr. Isola has led an exemplary life; and in the course of preparing for this case had we gone to trial, me and my co-counsel have interviewed probably in excess of 200 former employees of Damon who worked under Mr. Isola who over and over and over again what we heard was not just that he was a nice man or a good boss but that he was a person of enormous [14] integrity who would never ever knowingly do something to break the law or

even knowingly engage in unethical conduct. He is a long-time resident of this community, a father of two sons, both of whom are on to college. He is someone who by the government's own acknowledgment, before the events mentioned in, this information, and since the period covered by the original indictment, 1993, there is absolutely no evidence at all that Mr. Isola has done anything but continue to lead an exemplary life.

We were not surprised by the court's reaction when we had our conference before that probation might be the appropriate sentence at the outcome of these proceedings because it is probably a rare occasion when you have someone of Mr. Isola's background and standing who even finds himself in situation like this.

We ask the court to sentence Mr. Isola in accordance with the court's preliminary indications. We ask that the minimum period of probation be imposed and that given the fact that the company that Mr. Isola worked for has more than compensated the government for whatever conceivable losses it could have incurred, that no financial penalty be added to that.

THE COURT: Mr. Isola, is there anything that you wish to say?

THE DEFENDANT: Not at this time, sir.

[15] THE COURT: All right.

THE CLERK: Stand up.

THE COURT: The court will impose a sentence of three years probation and special assessment of – what is it?

MS. WINKLER: It is a hundred dollars, your Honor.

THE COURT: A hundred dollars. Is there anything further?

MR. ROMANO: No, your Honor.

MS. WINKLER: No, your Honor. (Clerk and court conferred.)

THE COURT: I wish to advise you that you have a right to appeal that sentence.

With respect to the government, what's the status of the other three defendants?

MS. WINKLER: Your Honor, I believe they are waiting to see what happened here today. There are further discussion [sic] under way.

MR. RUSSONIELLO: Your Honor, would the court note our appearances on behalf of the other defendants? We are here, Mr. Wall, Mr. Dwyer and myself. I am Joseph Russoniello from Cooley Godward in San Francisco. I represent Gerald Cullen and here with my co-counsel Kevin O'Day.

* * *

[16] MR. DWYER: Thomas E. Dwyer, Junior, for the defendant Beno Kon.

MR. WALL: John Wall for Bill Thurston.

* * *

[18] MR. WALL: Your Honor, my client Bill Thurston I've mentioned to you previously, as with the other defendants, thinks he is innocent and he has a

difficulty in acknowledging to anybody, especially to his Mormon community, even by way of [19] a nolo plea, that there is any guilt associated with his conduct.

* * *

[20] MR. WALL: He won't plead. He wants his day in court.

THE COURT: Well then, let's give it to him.

MR. WALL: Exactly.

THE COURT: Why don't we give it to him?

MR. WALL: Yes. Now, things change.

THE COURT: And you know, you've got to tell him about the acceptance of responsibility, not that this court would ever increase a person's sentence because he exercised his right to go to trial, but one has to bear in mind the lack of acceptance of responsibility.

MR. WALL: Your Honor, he is not responsible for any improper conduct. He is not.

* * *

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any

amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(5)

No. 06-378

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Having been advised that the petitioner in *Claiborne v. United States*, No. 06-5618, died on May 30, 2007, this Court, on June 4, 2007, vacated the judgment of the court of appeals in that case as moot. *Claiborne v. United States*, 551 U.S. __ (2007) (per curiam). The petition in *Thurston v. United States*, No. 06-378, provides an ideal vehicle for resolving the critical issues raised in the *Claiborne* petition regarding the imposition and review of sentences below the advisory Guidelines range.

On November 3, 2006, the Court granted certiorari in *Claiborne* to address the following issues:

> 1. Was the district court's choice of below-Guidelines sentence reasonable?
>
> 2. In making that determination, is it consistent with *United States v. Booker*, 543 U. S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

Thurston's certiorari petition, filed on September 14, 2006, presented a very similar issue:

> Whether it is permissible under the Sixth Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range.

The government took the position in its response that Thurston's petition should be held as to this and another issue in light of the grant of certiorari in *Claiborne* and *Rita*

v. United States, No. 06-5754. Brief for the United States 12-13, *Thurston*, No. 06-378. The Court apparently has held Thurston's petition pending resolution of the issues presented in *Claiborne* and *Rita*.

The sentencing histories of the *Thurston* and *Claiborne* cases are markedly similar. Thurston, like Claiborne, was sentenced by the district court to a sentence below the advisory Guidelines range. The government appealed the sentences in both *Thurston* and *Claiborne*, contending that the sentences were not reasonable under *Booker*.

Both Claiborne's and Thurston's below-Guidelines sentences were overturned on appeal based in large measure on the same fundamental rationale, i.e., that the farther a sentence varies from the advisory Guidelines range, the more compelling the rationale must be to support such a variance. The Eighth Circuit requires that a substantial variance from the Guidelines be justified by "extraordinary circumstances." *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). "'How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Id.* (quoting *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005)). Similarly, the First Circuit "consider[s] the reasonableness of a below-guideline sentence on a sliding scale: 'the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer . . . .'" App. 9a (citations omitted). Although the Eighth Circuit's and the First Circuit's doctrinal formulations differ slightly, their approaches are fundamentally the same.

Moreover, unlike *Claiborne* and *Thurston*, *Rita* involves a within-Guidelines sentence.[1] Although the resolution of the issues in *Rita* may have significant bearing on cases involving below-Guidelines sentences, considering a below-Guidelines sentence in tandem with a within-Guidelines sentence could significantly aid the Court in providing guidance on sentencing in the wake of *Booker*. As discussed in an amicus curiae brief filed in *Rita* and *Claiborne*, the *Thurston* case provides a good platform for addressing issues relating to below-Guidelines variances and specifically how providing undue weight to the Guidelines can violate section 3553(a)'s parsimony provision. *See* Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners 18-22, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006); *see also id.* at 22-25 (*Thurston* is "Exhibit A in demonstrating the failure of the Guidelines to reduce disparity").

By granting certiorari in the *Thurston* case, the Court can address the issues recognized to be worthy of review in *Claiborne*. The lower courts are sorely in need of the Court's guidance on these issues.

---

[1] The Court's grant of certiorari in *Rita* was limited to the following questions: (1) Was the district court's choice of within-Guidelines sentence reasonable? (2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences? (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

For these reasons, Thurston requests that this Court consider his petition on the merits, in conjunction with *Rita* or otherwise, and offers to submit briefing on an expedited basis before the Court's summer recess.

Respectfully submitted,

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(4)

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REPLY BRIEF

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MISCELLANEOUS

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Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006) 6, 8

ARGUMENT

In the government's response to Thurston's petition for writ of certiorari, the government argues that the Court should deny the petition as to Question 1, and should hold the petition as to Questions 2 and 3 pending the Court's decisions in *Rita v. United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618, in which the Court granted certiorari after Thurston's petition had been filed.[1]

1. Question 1 concerns the proper standard of proof to be employed for finding facts that increase a defendant's sentence under the advisory Guidelines system, an issue of pressing importance in virtually every sentencing case. In Thurston's case, the district court applied twenty levels of enhancements under the Guidelines based on heavily contested factual findings—such as amount of "intended loss"—using a preponderance standard. The base offense level for conspiracy under the applicable Guidelines is six with a resulting advisory Guidelines range of zero to six months' imprisonment. As a result of the judge's preponderance-based findings, the offense level jumped to 26 and the advisory Guidelines range to 63 to 78 months (capped at five years by 18 U.S.C. § 371). Thus, this case presents a clear and compelling context for resolving this question.

The government incorrectly suggests that the Court's earlier jurisprudence resolved the issue in its favor (Brief for

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[1] This Court granted certiorari in *Rita* and *Claiborne*, 127 S. Ct. 551 (2006), on November 3, 2006, and petitioners filed their merits briefs on December 18. Thurston filed his petition on September 14, 2006, and this Court requested a response from the government by October 30. The government filed its response on December 19 after two requested extensions.

the United States ("U.S. Br.") 10-12), and ignores the contrary observation of one member of this Court in *United States v. Booker*, 543 U.S. 220 (2005) (Pet. 15-16 (citing *id.* at 319 n.6 (Thomas, J., dissenting)). The government relies on this Court's pre-*Booker* decisions in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), *Edwards v. United States*, 523 U.S. 511 (1998), and *Witte v. United States*, 515 U.S. 389 (1995), for the proposition that this Court has "repeatedly made clear" that a district court may, consistent with the Constitution, impose a sentence within the statutory range based on facts found by a judge applying a preponderance standard. U.S. Br. 10.

Far from making the applicable standard of proof clear, only one of the cited decisions addresses the standard of proof issue, and it does so only in *dictum*. As this Court explained in *Booker*, *Watts* involved a "very narrow question" under the Double Jeopardy Clause and "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Moreover, the *dictum* in *Watts* regarding the standard of proof rested on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), a 5-4 decision from which the Court distanced itself in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See* Pet. 14; *see also Watts*, 519 U.S. at 166, 163 n.2 (Stevens, J., dissenting) (criticizing *McMillan* as "incorrectly decided" and expressing the view that facts that increased the defendant's base offense level "should have been proved beyond a reasonable doubt").

The Court in *Witte* did not address, much less resolve, whether increasing a sentence based on a finding made under a preponderance standard violates the Fifth Amendment. Like *Watts*, *Witte* presented an issue arising under the Double Jeopardy Clause, and the opinion was confined to that issue. *See Witte*, 515 U.S. 389.

Nor does *Edwards* bear on the issue before the Court. At issue in *Edwards* was whether a sentence can be founded on a sentencing court's factual finding that the underlying offense involved crack as opposed to powder cocaine. 523 U.S. at 513-14. Although the Court held that a sentence could be based on such a finding in the circumstances of that case, the decision was silent as to what standard of proof a sentencing court must apply in making that factual finding. *Id.* at 512-16.

The government further contends that after *Booker* the "maximum [sentence] authorized" is simply "the statutory maximum for the offense under the United States Code." U.S. Br. 11. But the Court held in *Blakely v. Washington* that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. 296, 303 (2004). *Booker* did not purport to vary this definition of statutory maximum. Thus, the Fifth Amendment requires that any fact that increases the sentence, even if the ultimate sentence is within the range set forth for the offense under the United States Code, must be proved beyond a reasonable doubt.[2]

This Court should grant certiorari on Question 1 now to address the applicable standard of proof for sentence-enhancing facts in the wake of *Booker*. The Court's analysis with respect to the standard of proof could conceivably be affected by the resolution of *Rita* and *Claiborne* because, as discussed in Thurston's petition (Pet. 16), the constitutional

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[2] The government's statement (U.S. Br. 11) that the courts of appeals after *Booker* have "consistently held" that a preponderance standard should be applied to facts found at sentencing ignores the Ninth and Tenth Circuit decisions cited in Thurston's petition (Pet. 17), which hold that due process may require a heightened standard of proof.

problem inherent in allowing a defendant's sentence to be increased based on facts found by the judge by a preponderance standard is magnified when the Guidelines are weighted more heavily than the other factors under 18 U.S.C. § 3553(a). Thus, alternatively, the petition as to Question 1 should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

2. The second question presented by Thurston's petition is "[w]hether it is permissible under the Sixth Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range." Pet. i. The First Circuit uses a "sliding-scale" approach to reviewing sentences below the advisory Guidelines range. Under this approach, the First Circuit "consider[s] the reasonableness of a below-guideline sentence on a sliding scale: 'the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . .'" App. 9a (citations omitted). At least four other circuits use this approach. *See* Pet. 18-19 (citing cases). This is similar to the approach taken by the Eighth Circuit in *Claiborne* but a somewhat different doctrinal formulation.

In recent decisions, the First Circuit has reaffirmed its requirement of increasingly compelling justifications for below-Guidelines sentences (essentially a presumption of unreasonableness), and has further demonstrated that this doctrine is related to what is in essence and effect, if not explicitly in name, a presumption of reasonableness for within-Guidelines sentences. For example, in one recent case, the First Circuit held:

> [W]e have recognized that sentences that fall inside a properly calculated guideline sentencing range require a lesser degree of explanation than those that fall outside the guideline sentencing range (whether above or below). *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006). Accordingly, a district court's statement of reasons for imposing a within-the-range sentence need not be as cogent as its reasons for imposing an outside-the-range sentence. *Cf. id.* (explaining that "the farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification . . . the judge must offer" (citation omitted)).

United States v. Turbides-Leonardo, 468 F.3d 34, 41 (1st Cir. 2006); *see also id.* ("It will be the rare case in which a within-the-range sentence can be found to transgress the parsimony principle."). Perhaps unsurprisingly, because of the undue weight afforded the Guidelines in the First Circuit, there is a stark difference between the results in below-Guidelines cases and those in above- and within-Guidelines cases. *See* Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at App. 6a, *Claiborne*, No. 06-5618 (Dec. 18, 2006) (summarizing results of analysis of post-*Booker* reasonableness-review cases in First Circuit: above-Guidelines sentences appealed by defendants and vacated (1/3); within-Guidelines sentences appealed by defendants and vacated (0/30); and below-Guidelines sentences appealed by government and vacated (4/4)).

A writ of certiorari should be granted here, and this case should be either consolidated for oral argument with *Rita* and *Claiborne*[3] or scheduled for later argument so that the issues

[3] Argument is presently set for February 20, 2007.

raised by those cases can be considered in the additional light that Thurston's case affords. *See, e.g.*, Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners at 18-22, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006) (discussing *Thurston* as "good case study" of how adherence to Guidelines can violate the parsimony provision of § 3553(a)). Regardless, the resolution of Question 2 in this case may be affected by the Court's decisions in *Rita* and *Claiborne*. Accordingly, the Court should grant certiorari on Question 2 now, or alternatively, as the government suggests (U.S. Br. 12-13), the petition as to Question 2 should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

3. Question 3 of Thurston's petition is "[w]hether a district court has discretion under 18 U.S.C. § 3553(a) to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar." Pet. i. In its responsive brief, the government fails to differentiate Question 3 from Question 2, and characterizes them collectively as concerning whether "the standards applied by the court of appeals in reviewing [Thurston's] below-Guidelines sentence for unreasonableness are inconsistent with *Booker*." U.S. Br. 12; *accord id.* at 13 (stating that "Questions 2 and 3 . . . concern the standards for reviewing a sentence for unreasonableness"). Based on this imprecise characterization, the government argues without qualification that the Court should hold the petition as to both Questions 2 and 3 pending its decisions in *Rita* and *Claiborne* addressing "various aspects of [post-*Booker*] sentencing procedure." *Id.* at 12-13.

One critically important aspect of Question 3 does not appear to be subsumed within the questions presented in *Rita* and *Claiborne*—namely, the issue involving interpretation of 18 U.S.C. § 3553(a)(6), which requires sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The First Circuit's holding that Thurston's exercise of his right to trial rendered him not "similarly situated" to codefendant Isola, who pleaded *nolo contendere* to the same crime and was otherwise similar (except *more* culpable),[4] is patently wrong as a matter of statutory interpretation. Thus, Thurston's petition as to Question 3 should be granted and the First Circuit's decision reversed regardless of the outcome in *Rita* and *Claiborne*.

Other aspects of the First Circuit's disparity analysis could potentially be affected by the Court's decisions in *Rita* and *Claiborne*. For example, the First Circuit "acknowledge[d] the district court's concern that *too* wide a divergence between the sentence imposed on Isola and Thurston could negatively affect the public's 'respect for the law'" and could "undermine the accepted notion that similar conduct should be punished in a somewhat similar manner." App. 18a. The First Circuit nevertheless gave insufficient deference to the district court's determination that anything greater than a disparity of six months' confinement and a $25,000 fine would promote public disrespect for the law and

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[4] In a recent case, the First Circuit reaffirmed its holding, stating that "a district court may consider disparities among co-defendants in determining a sentence" but citing *Thurston* for the proposition "that a defendant who chooses to enter into a plea bargain is not similarly situated to a defendant who contests the charges." *United States v. Vazquez-Rivera*, No. 05-2632, 2006 WL 3593482, at *5 (1st Cir. Dec. 12, 2006) (citing *United States v. Thurston*, 456 F.3d 211, 216-17 (1st Cir. 2006)).

therefore run afoul of one of the core goals of sentencing codified in § 3553(a)(2)(A). Instead, the First Circuit set its own floor of three years' imprisonment and then remanded for the district court to carry out resentencing.

The outcome of Thurston's case could be affected by the Court's decisions in *Rita* and *Claiborne* to the extent they give guidance to the lower courts as to the weight to be given to the Guidelines, the role of the other § 3553(a) factors, and how the courts of appeals should review district courts' sentencing decisions. *See, e.g.*, Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners at 22-25, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006) (discussing the goal of reducing unwarranted sentencing disparities, and arguing that *Thurston* is "Exhibit A in demonstrating the failure of the Guidelines to reduce disparity," especially because "the reduction of sentencing disparities of defendants accused of the same crime present the 'test case' to assess the legitimacy of the Guidelines"). Therefore, the Court should grant certiorari on Question 3 now, or alternatively, the petition as to Question 3 should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

CONCLUSION

As to Question 1, the Court should grant certiorari now to resolve the pressing issue of whether the Constitution requires a sentencing court to use a reasonable-doubt standard when making factual findings that increase a defendant's sentence under an advisory Guidelines system.

This case also presents an excellent and timely vehicle for the Court to evaluate whether the "sliding-scale" approach to reviewing outside-Guidelines sentences that has

been adopted by the First Circuit and several other circuits is consistent with *Booker* and 18 U.S.C. § 3553(a). Review by this Court would provide a helpful additional reference point for resolution of these issues in tandem with *Rita* and *Claiborne*. Thus, as to Question 2, the Court should grant certiorari now, and this case should be either consolidated for oral argument with *Rita* and *Claiborne* or scheduled for later argument so that the issues raised by those cases can be considered in the additional light that Thurston's case affords.

A critically important aspect of Question 3 regarding interpretation of 18 U.S.C. § 3553(a)(6) does not appear to be subsumed within the questions presented in *Rita* and *Claiborne*. Thus, although other aspects of the First Circuit's disparity analysis could potentially be affected by *Rita* and *Claiborne*, the petition as to Question 3 should be granted regardless of the outcome in those cases.

Alternatively, as to each question, the petition should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

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